

## **EXHIBIT X**

IN THE STATE COURT OF BIBB COUNTY  
STATE OF GEORGIA

LESTER E. KIRKLAND, JR.,  
PLAINTIFF

VS

NORFOLK SOUTHERN  
RAILWAY COMPANY,  
DEFENDANT

**COPY**

Civil Action No.

45273

TRIAL

held before

HON. WILLIAM P. ADAMS

and a JURY

VOLUME I of III

March 19, 2001  
2:00 p.m.  
Bibb County Courthouse  
Macon, Georgia

REPORTED BY: Julia J. Scarborough

HAWTHORNE & WEBB COURT REPORTING  
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1                   THE COURT:     Please be seated. Ladies and  
2 gentlemen, thank you for being back on time. We are now  
3 ready to proceed. As I mentioned earlier, we would start  
4 at 2:00 o'clock with the opening statements by the  
5 attorneys. You will recall my explanation this morning,  
6 I hope, about generally how a trial will proceed. The  
7 Plaintiff gets to go first. But let me first mention to  
8 you that you have been given these pads and pencils, and  
9 the rules do permit jurors to take notes if they want to.  
10 But let me just give you these brief instructions. You  
11 are not required to take notes. If you prefer not to,  
12 that's okay, if you want to take a few notes and not  
13 many, that's okay, it's just up to you how you do that.  
14 The main -- one of the main points I want to make though  
15 is, don't let note-taking divert your attention away from  
16 paying close attention to what is being said by the  
17 lawyers and then by the witnesses as they testify. The  
18 notes that you take, of course, are just memory aids,  
19 they are not evidence in themselves, and you should not  
20 let somebody who has taken a lot of notes influence later  
21 your recollection of the evidence, you should rely on  
22 what you remember with or without your notes as you  
23 choose to take them or not. Your notes will be  
24 confidential, they should not be reviewed by anyone else  
25 except you until you are in the deliberation stage when

1           the case is submitted to you, at that point you can share  
2           from your notes, but until then, they are your notes,  
3           your notes only, don't share them with anybody. After  
4           the trial is over, we will take them up and they will be  
5           destroyed. But just, again, the main thing I want you to  
6           do is pay close attention to what is said, and taking  
7           notes is just up to you as to whether it will be helpful  
8           to you in this process of being a juror.

9           All right, Mr. Wettermark, you get to go first in  
10          the opening statements.

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1 OPENING STATEMENT FOR THE PLAINTIFF

2 MR. WETTERMARK: Thank you, Your Honor. Members  
3 of the Jury. This is a case about safety in the work  
4 place. It's a case about what happens when a company  
5 fails to uphold its responsibility to provide its  
6 employees with a safe place to work. But more important  
7 than that, this is a case about a man who went to work  
8 for a railroad when he was 19 years old, spent his whole  
9 life working for that company, and now, at the age of 45,  
10 finds himself disabled, all because his employer  
11 repeatedly refused to provide him a safe place to work.  
12 What I would like to do, is tell you about that man  
13 first. He is Lester Kirkland. I would like to tell you  
14 about Lester Kirkland. I want to tell you what happened  
15 to Lester, and then I am going to tell you why we are  
16 here. Lester went to work for the railroad when he was  
17 19 years old. He came from a railroad family. His  
18 father worked for the railroad for 45 years, all he ever  
19 wanted to do. He hired on as a trainman, got promoted to  
20 a conductor, and for the next 25 or so years he worked  
21 these jobs in his home state, home town area, near Aiken,  
22 South Carolina. He worked for the Norfolk Southern  
23 Railroad Company. They have three big hubs up there, in  
24 Columbia, in Greenville/Spartanburg, and Augusta. And he  
25 worked in that triangle that was formed by those three

1 railroad hubs. He was a trainman, a conductor; these are  
2 the men that do all the groundwork associated with moving  
3 trains. They throw the railroad switches, they climb up  
4 on the cars and tie up hand brakes, they couple, they  
5 uncouple cars, they ride on the side of cars, sometimes  
6 for many miles. A trainman's safety on the railroad is  
7 tied up in two things: His hand holds and his foot  
8 holds. Those are all that stand between him coming home  
9 safe at night and falling down and being a casualty. In  
10 Lester's job, starting about 1992, he started working a  
11 job that was known as the Aiken local. This is a local  
12 switching job that would switch various industries in the  
13 Aiken area, pick up cars and deliver cars, and then put  
14 them together and leave them for trains to pick up and  
15 take to various cities. It's not a very large area that  
16 he worked in, in miles, maybe 20 or 30 miles all total.  
17 We have this diagram just to get you kind of oriented.  
18 But the Aiken Depot was right in the middle of this area,  
19 and he travels in his train, he and his train crew would  
20 get their locomotive engine, and they would go and work  
21 all these industries. And by work, I mean, they would go  
22 pick up cars and leave cars at all these industries up  
23 and down these tracks. Several of these industries are  
24 kaolin loading facilities, clay loading facilities. One  
25 of them is called the W. R. Grace Clay-Loading Facility,

1 and this is what this case is about, this facility right  
2 here. When Mr. Kirkland went on the job in 1992, he  
3 would take empty cars every day down to the W. R. Grace  
4 facility, and you will see photographs of the facility,  
5 but it's a railroad car loading facility where empty cars  
6 are pushed into the facility. They go under these  
7 loading platforms and clay is poured down into the top of  
8 these hopper cars, and then the cars are pushed through  
9 and picked up and take -- the loaded cars are taken out  
10 the other side. Well, what was supposed to happen at  
11 this facility was, after they loaded the cars, the grab  
12 irons, the foot sets, the areas where these men worked,  
13 were supposed to be blown off, cleaned off, get the clay  
14 off of these ladders and grab irons these men rely upon  
15 to do their job. It was not being done. And starting  
16 back as far back as 1992, for sure, and I am going to  
17 bring to you in this courtroom just about every man who  
18 has worked this job from 1992 up until the day he got  
19 hurt, they wouldn't clean these things off. This is what  
20 one of these cars looks like up close. You see the  
21 ladders, you see the hand brakes, this is where the men  
22 work, they are up and down these ladders, going across  
23 these platforms. When they would go pick up these loaded  
24 cars, all of these grab irons, all these platforms would  
25 be covered with kaolin. You will hear these men tell you

1           about kaolin, it's slick, it's a very, very fine powdery  
2           substance, and it's very, very slick, even in its dry  
3           state it's very slick, but when it gets wet, it is about  
4           as slippery a substance as you can ever encounter. And  
5           so Mr. Kirkland is trying to do his job and encountering  
6           these cars on a daily basis. And he, and every crew  
7           member who was there, tried to get something done about  
8           it. You will hear testimony from each of these men, how  
9           they started calling the officials, saying, you all need  
10          to do something about this. They called over and over  
11          and over, and could never get anything done. Oh, sure,  
12          they would come out there and maybe for one or two days  
13          they would start blowing them off, and then it would go  
14          right back to where it was. By 1996, he and his engineer  
15          -- actually it was his engineer, had said, I have had  
16          enough, I am going to do something about this. And so  
17          the engineer started on a daily basis calling the  
18          railroad, whatever official he could get, saying, do  
19          something about this; this is a safety hazard; someone is  
20          going to get hurt. They kept a calendar to keep track of  
21          this, put a calendar up on the depot wall, and every day  
22          they put down who they called. And this went on for nine  
23          months, and it was never corrected. Finally, after nine  
24          months, the official who was in charge of this area comes  
25          into the depot, sees this calendar with all the

1           complaints on it, tears it down, does not fix the  
2           situation. And that brings us to January 23rd of 1998.  
3           Lester was working, as he had been for years, the job.  
4           It was a rainy day. He and his crew, as they always did,  
5           went down to the W. R. Grace facility to pick up the  
6           cars. When they got in there, as it always was, the cars  
7           were just coated with kaolin, coated with the stuff, and  
8           it was wet. They did not have -- when they got there  
9           they did not have to get on the cars, they were able just  
10          to couple up to them and pull them out when they got in  
11          the facility. So when they first got there, he avoided  
12          having to go up and climb up on these cars. And then  
13          they proceeded to do the rest of their work, pulling  
14          these loaded cars with them. They picked up the cars  
15          early in the morning they continued to work the rest of  
16          their job, not having to deal with these cars, pulling  
17          them around behind them, but not having to deal with  
18          them, they were working with the other cars. And  
19          finally, in the afternoon, one of the last things they  
20          were going to have to do was to take the cars down to the  
21          main line, put them in a siding where they were going to  
22          be picked up by trains to be taken to either Augusta or  
23          to Columbia. Well, in the course of switching down here  
24          Mr. Kirkland had to get on these cars, and had to get on  
25          it for the purpose of tying up hand brakes and knocking

1 off the hand brake. When he got on it the first time,  
2 they will tell you, there is no way you can keep from  
3 slipping. I mean, it's just a slippy, slidly experience.  
4 They have learned how to try to brace their feet to  
5 minimize the slip. He was able to get the hand brake on  
6 the first time he was up on the car okay. A little while  
7 later, though, he had to get back on the car to release  
8 the hand brake. And when he got up there to release the  
9 hand brake, it is a wheel like this, there is a little  
10 lever, it's hard to see, but there's a lever you can pull  
11 that releases it, or you can turn this wheel to release  
12 it. Well, the hand brake was gummed up, probably from  
13 all the clay, we don't know. But it's something they  
14 encountered all the time, they found if you kept giving  
15 it a little pressure, eventually you could get it loose.  
16 And so he was up there in the proper stance brace, trying  
17 to get this thing loose, and just like that, his feet --  
18 he thinks it was his foot that went first, but in an  
19 instant, he couldn't hold on with his hand because his  
20 leather gloves were caked with kaolin, and down he went,  
21 landed on his back. And he went -- it happened so fast,  
22 and because his feet went -- his hands just came off, he  
23 went over backwards and landed on the -- fell to the  
24 ground and landed on his back, he put his hand out to try  
25 to catch himself. Injured pretty severely his right

1           thumb, it was immediately swelling up, and terrible pain,  
2           immediately had significant back pain. Picked himself  
3           up, managed to get up to his crew members, told them, I  
4           have fallen, I have hurt myself. And they say, well, we  
5           are almost finished, let's get back to the depot and we  
6           will report the injury. Well, he goes back to the  
7           depot. They report the injury, five officials for the  
8           railroad come down to the depot. For the next four and  
9           five hours they interrogate the men, these men keep  
10          telling them, this is the situation we have been telling  
11          you about for five years. They go down to the scene  
12          where they observe the kaolin on the cars. One of the  
13          officials tells Mr. Chapman, the gentleman sitting over  
14          there, you get out there on Monday morning with these men  
15          and let's get this situation squared away. And they send  
16          Lester home after five or six hours. They ask him if he  
17          would not go to the doctor because if he goes to the  
18          doctor, if he gets medication, that makes it a reportable  
19          injury and hurts their safety record. And they said,  
20          will you work with us to protect the safety record. And  
21          he said, yes, I will be glad to. So he went home that  
22          night, he was in -- didn't sleep at all that night,  
23          pretty bad pain. Saturday was putting ice on his back.  
24          The officials -- they gave him ice packs, and said, here,  
25          use these ice packs, they will help. And so he used ice

1           packs on his hand and his back all weekend. Monday, he  
2           did feel some better, he was still in pain, but he wanted  
3           to try to protect the safety record, so he goes to work,  
4           same place, back to the depot. They are waiting for Mr.  
5           Chapman, he doesn't show up, so the crew says, let's go  
6           on to work. They get in their engines, start heading  
7           back to the same place, W. R. Grace. They have some  
8           engine trouble, so they have to wait a while for some  
9           repair work, and while they are waiting, Chapman comes  
10          up. Lester says, look, while we are stuck here, why  
11          don't you and I go down to the facility. So he says  
12          fine. Well, they go down to the W. R. Grace facility,  
13          but Mr. Chapman stops way up here at the empty side where  
14          all the cars are clean coming in, and doesn't go down to  
15          the area where all the problems are. And Lester says,  
16          why don't we go down there, and I'm going to show you  
17          this problem. He says, I have seen enough, and leaves.  
18          So Lester goes back to his crew, they get in the train  
19          and they go to switch this same place. They get down  
20          there, they go shove in to where the loads are and they  
21          are covered with kaolin. And he and his crew had had  
22          enough. They said, we ain't doing it. They called Mr.  
23          Chapman. He comes down there, and they said, you come  
24          look at this. And they get Mr. Chapman, they get the  
25          official from the W. R. Grace place. The W. R. Grace

1 official says, well, I haven't seen it this bad in a  
2 while. And Lester turns to Mr. Chapman, and says, what  
3 are we going to do, what do you want us to do about it.  
4 He tells them, switch them, this is a good customer.  
5 They sat there and looked at each other in disbelief. He  
6 says, I have got to go, went to a derailment somewhere,  
7 and left them there. So they did what good employees do,  
8 they tried to switch the cars. They got them out of the  
9 W. R. Grace facility safely, got them up here as far as  
10 the Aiken depot where they were going to do a maneuver  
11 where they wanted to get the locomotive engine from one  
12 side of the cars to the other, and to do that, they are  
13 required to go and tie up hand brakes. He went up on the  
14 car, and again, it was coated with this kaolin, on there  
15 doing his best, and again his feet slid out from under  
16 him, he goes halfway down but catches himself. Mr.  
17 Sharpe, his trainman, was standing there and saw him  
18 fall, saw him with tears in his eyes afterwards, had to  
19 help him down off the car and takes him into the depot,  
20 and they again call the officials. Mr. Chapman comes out  
21 there, sees Mr. Kirkland hurt, says he will call him  
22 relief. Asks him, can you all go and place these cars  
23 that you just pulled down here on the Warrenville site.  
24 Mr. Kirkland said, Mr. Chapman, if we put them down here  
25 a train crew is going to come through here tonight, pick

1           these cars up, and they are going to have to get on them  
2           with all this kaolin on them. He said, I will worry  
3           about that, sent them down there to put the cars down  
4           there. Lester was -- he was angry. And he turned to his  
5           crew, and says, I am going over his head. Got on the  
6           phone, started calling whoever he could; tried the  
7           terminal superintendent, he was in meetings; tried the  
8           assistant superintendent, he was busy. Hung up the  
9           phone, tried to call the agent there -- you will hear  
10          from the agent. He'll tell you about what a problem this  
11          was. When he couldn't get anybody, couldn't think what  
12          to do, so he called his wife, and asked his wife, said,  
13          do we have a camera, if you do, get down here, I want you  
14          to take pictures of this, and she did. This is just one  
15          of the pictures you will see that shows these cars. This  
16          white stuff -- this is the platform he walked on. When  
17          you look at this, you can see there is a quarter of an  
18          inch of raised kaolin on top of these little tiny  
19          surfaces, probably three or four or five inches worth of  
20          it has piled up in here. You can see on the grab irons  
21          where there is still kaolin coating the grab irons. This  
22          is how much kaolin was left on these surfaces after these  
23          cars had been pulled for three or four miles. This is  
24          after they have been jiggled, and after it had blown off  
25          in the wind, this is how much was left then. And you

1       will see the other pictures. The locomotive engines  
2       these men worked on, the walkways, were covered with the  
3       kaolin. That's why I told you just a few seconds ago,  
4       that this is a case about a company that failed in its  
5       obligation to provide its employees a safe place to work.

6                 Now, let me tell you what has happened to Lester.  
7       He went to a company doctor the next day; he went to his  
8       family doctor; he was referred to specialist; and he has  
9       two significant injuries. And I would like to tell you  
10      what you are going to hear about those injuries. You  
11      will hear the doctors -- I already know what the  
12      testimony is from the doctors, because we have already  
13      taken their testimony. They testify by videotape  
14      depositions, and so we'll play a video tape of what the  
15      doctor's testimony is about his injuries. His back  
16      injury, the diagnosis by the doctor is that he had a  
17      traumatic injury to his lower back, he damaged the disk  
18      at both the L4-5 level and the L3-4 level. The damage to  
19      the disk has been confirmed by MRIs, L4-5 disk is bulging  
20      and it has a partial tear of the annulus. The doctor  
21      will explain to you that in our back we all have these  
22      intervertebral disks, they are like the shock absorbers  
23      between the individual bones of the spine. When these  
24      are overloaded or subjected to trauma, like falling, it  
25      damages them, and it tears this outer surface of these

1 disks, and that's what the MRI scan showed on the L4-5  
2 disk, which is this one, and it causes the disk to bulge  
3 out as is depicted, and it puts pressure on the nerves  
4 and the spine that go down the leg. He has an injury to  
5 both the L4 disk and the one above it, the L3-4 disk. He  
6 has some reflex loss in his right patella reflex, which  
7 is from the nerve damage, and this has been confirmed on  
8 four MRIs and two EMGs, it's been confirmed. The other  
9 injury was, which he has, is that he, like all of us, as  
10 we get older, we have degenerative changes, wear and  
11 tear, our backs are not what they were when we were  
12 younger. It's something we all have, but what happens  
13 is, when you have these normal degenerative changes, and  
14 you subject your spine to trauma, these wear and tear  
15 changes, which everybody -- we all get it to some degree  
16 and it's not a problem until you have trauma or an  
17 injury. And the doctor will tell you that this trauma  
18 adds years and years to the spine. So he has this  
19 condition going on. The reason this is so important, and  
20 you will see in a second, as he went through his  
21 treatment, one of the things that he considered was to go  
22 in and have surgery to see if they could repair the  
23 damage. But surgery doesn't work very well when you have  
24 all of these things together. His right hand, which he  
25 fell, he -- the diagnosis is ligamentous laxity of his

1 right thumb joint, he stretched the ligaments to the  
2 point that it was loose in his joint. And the doctor  
3 will tell you the only thing that can be done for that --  
4 surgery won't repair it. The only thing that can be done  
5 is simply to fuse the joint; by that, just make it fuse  
6 where it doesn't move at all. It's kind of a catch-22  
7 type decision. They fuse the joint, you lose your  
8 movement in your thumb joint, but you get rid of your  
9 pain. If you don't fuse it, well, you can keep more  
10 mobility but you have pain. The treatment he has had for  
11 his back, the doctors have been very, very methodical  
12 about how they have treated his back. They started off  
13 for the first month saying, let's just rest, medication,  
14 see if it doesn't get better on its own; it didn't. They  
15 then put him in a physical therapy program for the next  
16 two months to see if that would help; it didn't. They  
17 then started a series of lumbar epidural injections,  
18 which is where they actually put steroids into the spinal  
19 canal hoping to help the situation; it didn't. Finally  
20 sent him to a neurosurgeon to see if surgery could help;  
21 it won't. Finally, they put him in, what is the last  
22 resort for people like this, they put him in a pain  
23 control program. The doctors of the pain control program  
24 will tell you that this is only for people who have  
25 significant and life style limiting pain with no

1 treatment or cure identifiable. And that's where he is  
2 now. He undergoes a regime of treatment for his spine.  
3 He gets injections in his back about once a month. He  
4 takes four different types of medication, Oxycontin,  
5 which is a very powerful pain killer; Neurontin, which  
6 helps with the nerve damage; he takes Celebrex, which is  
7 an antiinflammatory to help with the inflammation of the  
8 spine; and he takes an antidepressant, which brings me to  
9 the next part about this case. What the doctor is going  
10 to tell you is that, especially in the spring time, Mr.  
11 Kirkland develops severe depression. And the reason is,  
12 is because his activities are so limited. Before this  
13 accident, he led a very full and active life, played  
14 golf, tennis -- I have got some pictures of him before  
15 the accident. He can't do any of that now. He is  
16 dependent on his medications, and he can't do any of  
17 that, and as a result he gets terribly depressed, and so  
18 they give him antidepressant medication. His hand was in  
19 a cast for a month and then a splint. The doctors  
20 recommended a fusion surgery. Lester has elected not to  
21 have it yet, because he says, you know what, right now I  
22 have pain, but I can live with it, and I would rather  
23 keep that extra motion I get without a fusion. Whether  
24 he has it down the road, we don't know. When he was  
25 first off, and undergoing all this medical treatment, he

1           was in contact with -- the railroad has a Rehabilitation  
2           Program, and he was in contact with them, and you will  
3           see all the letters he wrote to them. He told them --  
4           they were saying, you want us to help you find another  
5           job. He said, I want your help, but not right now, I am  
6           trying to get back to my old job. And so for the first  
7           year he did everything the doctors asked of him trying to  
8           get back to work. By a year after the accident, March of  
9           '99, his doctor told him, you ain't ever going back to  
10          work on the railroad, you won't ever do anything in your  
11          life except sedentary type work. And so Lester wrote to  
12          the railroad at that point, and said, well, you know, I  
13          can't go back to work, I want your help. Well, the only  
14          thing that he asked the railroad to do -- he told them,  
15          and you will see the letter -- he told the railroad, I  
16          will do anything, but I have got -- you know, my family  
17          is here, and I don't want to move outside of the state of  
18          South Carolina. You have got three big hubs here, I will  
19          do anything you can find for me. But my daughter is  
20          here, I promised her I wouldn't be an absentee father,  
21          and so find me a job near here. Well, the first job  
22          offer they find for him, they offer him a clerk's job in  
23          Dearborn, Michigan. He writes back, says, I can't do  
24          that. They offer him jobs in Atlanta, Georgia. He says,  
25          can't you find me something closer to home. Finally,

1           they find him a dispatcher's job in Greenville. And he  
2        says great, I am ready. Goes to Greenville, which is a  
3        good distance from where he lives now, but he was fine  
4        with it. Goes to Greenville, they say, you are medically  
5        disqualified. You can't do the dispatcher's job because  
6        of the medications you take. They hired a company called  
7        GENEX, which is a rehabilitation company, to see if they  
8        could help find him a job. They haven't been able to.  
9        But I took the testimony of the lady from this company  
10      who has been working with him, and she told us under oath  
11      that he has done everything that she has asked him to do  
12      trying to find work, and in fact, has gone above and  
13      beyond the call of duty trying to find work. He has  
14      found work. He went to a friend of his who has a title  
15      type company and he allows him to work on his own  
16      schedule, pays him \$7 an hour, which in his situation is  
17      great; it allows him to go work for two or three hours,  
18      and if he needs to go home and lie down with his back, he  
19      can. And so he has been doing that sort of work. He has  
20      worked his way up from, I think, 15 hours a week to 20  
21      hours a week, and now he is working about 25 hours a  
22      week, the best he can do right now. That's what happened  
23      to Lester Kirkland.

24           Now why are we here? We are here because, like Mr.  
25      Garland told you, there is no workers' compensation for

1 railroad workers. They are covered by a federal law,  
2 called the Federal Employers Liability Act. And if he  
3 wants to get compensation, it can only be awarded by you.  
4 And you have to ask two questions, you'll have to answer  
5 two questions. One, is he entitled to receive  
6 compensation; in other words, was he injured as a result  
7 of the railroad's negligence. And if you find that he  
8 was injured because of the railroad's negligence, then he  
9 is entitled to receive full compensation. Well, I am  
10 confident that by the time you hear all the evidence in  
11 this case there is not going to be any question about how  
12 negligent this railroad was. The elements of  
13 compensation that the law says he is entitled to, if this  
14 was the railroad's fault -- there's three types of  
15 compensation that you all can award. One is his past  
16 lost wages, that's how much money he has lost to date out  
17 of pocket. Two, is the present value of his future lost  
18 wages and benefits, that's his wages and also includes  
19 his health insurance, which is going to run out at the  
20 end of this year. He is entitled to recover that. And  
21 you will hear an economist come testify to tell you how  
22 to calculate this; you will hear a vocational  
23 rehabilitation expert to come here and tell you what his  
24 prospects are in the work force. And then finally, you  
25 are entitled to award him a sum to compensate him for his

1 pain and suffering, including his permanent physical  
2 disability and his loss of enjoyment of life. I can't  
3 bring an economist to help you on this. The law asks you  
4 to use your common sense and the law asks you to be fair  
5 and reasonable. And I mean that truly, fair to him and  
6 fair to the railroad. But you need to, if you feel like  
7 he is entitled to compensation, to try to find a sum of  
8 money that would be fair to him for what has happened to  
9 him. That's what this case is about. I will look  
10 forward to letting you hear the evidence. I think, by  
11 the end of this case, you will be impressed with two  
12 things. One, you are going to be impressed with how  
13 negligent this railroad was, and how pointless this  
14 accident was, how it didn't need to happen. And two, I  
15 think you are going to be impressed by the type of man  
16 this is. Thank you.

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1           **OPENING STATEMENT FOR THE DEFENDANT**

2           THE COURT:     Mr. Garland, you may proceed.

3           MR. GARLAND:   May it please the Court?

4           THE COURT:     Yes, sir.

5           MR. GARLAND:   Ladies and gentlemen of the Jury, as  
6           I have mentioned this morning, my name is Ben Garland. I  
7           practice law here in Macon in the firm of Hall, Bloch,  
8           Garland and Meyer. We represent Norfolk Southern  
9           Railroad in this case. And with me is Mr. John Chapman,  
10          who lives in Forest Park, Georgia. He is a trainmaster  
11          there in the Atlanta depot. During the year 1998, which  
12          is the year in question here, he was a trainmaster in  
13          Columbia, South Carolina. He was in charge of this area,  
14          and he will testify as a witness in this case. Now,  
15          members of the Jury, as Judge Adams told you earlier  
16          today, the opening statement by the lawyers is not  
17          evidence. Now, Mr. Wettermark has made, what I guess is,  
18          kind of a closing argument about what he perceives the  
19          evidence to be, but the evidence is not what he says, or  
20          not what I say, it's what the witnesses say, and doctors  
21          -- it's what the doctors say in their video depositions.  
22          Members of the Jury, there are a lot of things in this  
23          case that are not in dispute at all, and then of course  
24          there are some things that are going to be in dispute,  
25          and that's what you will be called upon to decide the

1 disputed issues in the case. Now, first of all the  
2 evidence is not in dispute that Mr. Kirkland was a  
3 railroad employee, has been with the railroad, like the  
4 mid-70s. You will hear the history of his progression of  
5 the steps, and he finally became the conductor. And you  
6 will hear what duties a conductor has, what he does and  
7 what his responsibilities are. And he held that job  
8 until January of 1999, and that's what we are here about  
9 today. Now, the evidence will show, I guess, and common  
10 sense tells you, that railroading, out on the road, is a  
11 physically demanding job. You are out there in all sorts  
12 of weather, hot in summer and cold in the winter, and  
13 then when it rains, that you are there in the rain,  
14 that's just a fact of it. Of course, those may be some  
15 of the bad things. The good things about it is you are  
16 out there in the nature, you are outdoors, and your --  
17 Norfolk Southern, you are working for a very good  
18 company. And I think you will feel that when you hear  
19 all the evidence in this case. And the way the evidence  
20 progresses, the Plaintiff will put in their's first, and  
21 then we will put in the evidence afterwards. Now,  
22 Norfolk Southern, like all railroads, has certain rules,  
23 there are rule books, operating rules and safety rules.  
24 These are these little books right here that will be in  
25 evidence, they have certain rules that the railroaders

1 must follow. Each employee gets these rules when he  
2 signs on, he keeps them, they have seminars on them and  
3 meetings on them and so forth. And in these rules, each  
4 member of the crew has some specific responsibilities. I  
5 guess the easy one is the engineer. Now, his  
6 responsibility is, he drives the train, and has things to  
7 do with carrying the train down the road, but then, and  
8 this may surprise some people, the engineer, though, is  
9 not in charge of the train. The person in charge of the  
10 train, as these rules will say, is the conductor. Now,  
11 one specific rule, that I think is relevant and important  
12 in this case is Rule 586, and that provides several  
13 things the conductor must do, and this is Mr. Kirkland in  
14 this case. And one the conductor is charged with, his  
15 responsibility, he must remedy any defects of equipment,  
16 and this is important, must remove from the consist, and  
17 the consist is the train, any cars that are unsafe to  
18 run. Any cars that are unsafe to run is the conductor's  
19 job, and it just makes sense. The conductor is right  
20 there on the scene, he can make a decision and does make  
21 decisions, you will hear evidence of that, if a car is  
22 defective to a degree that endangers his safety or the  
23 other people in the train, or anybody else, it is his job  
24 to just leave that particular car off and set it aside.  
25 Now there are other general safety rules that you will

1           hear about. And one that you will hear about is Rule M,  
2           and that provides generally that employees should not,  
3           and shall not do any work that they feel is hazardous.  
4           Those are rules in the book, and they are the guidelines  
5           that the industry runs by. And I invite your attention  
6           to the discussion about these railroad rules, and how  
7           they apply to the facts that you hear in this case.  
8           Another undisputed fact, members of the Jury, is going to  
9           be that the railroad delivers these empty cars to the W.  
10           R. Grace and Company, which is a kaolin company, I guess  
11           like some of the kaolin companies in the Middle Georgia  
12           area, and the fill these cars with kaolin, and then they  
13           -- the railroad then pulls the full cars away for  
14           further shipment. Now, I think the evidence is going to  
15           be undisputed that the W. R. Grace and Company employees  
16           that fill these cars, they fill them through these big  
17           filters on top. They dump the kaolin in and kaolin, the  
18           evidence will be, is like dust powder. It's like dust  
19           and powder, and it does spread into the air, wherever --  
20           whatever is there is going to catch some of that dust.  
21           Now, I believe the evidence is going to show that they  
22           have installed there a big blower at the end of this --  
23           they come in to get the kaolin dumped in them, and as  
24           they are pulling out, they have a big, kind of an air  
25           dryer or air blower, I guess it's kind of like you see in

1           a car wash when your car goes through and at the end it  
2        gets blown off, and that is to blow away the kaolin dust  
3        that is all scattered around. And I kind of think it's  
4        like the situation, if any of you drive up Highway 87, up  
5        towards Jackson, and you pass by the big rock quarry  
6        there, well, the trucks are coming out and the dust is  
7        kind of flying off, and when it's real dry, most of that  
8        whole area is going to be covered in kind of a white  
9        substance. When it rains it kind of washes it all off.  
10      But I think that's probably kind of what the testimony is  
11     going to be, what the evidence is going to show. Around  
12     that kaolin plant, it's going to be dust in the air,  
13     that's a fact of life. It's almost like, when they pick  
14     it up at a paper mill, there's going to be a paper  
15     smell. There are just some things that are going to be  
16     there, and this is going to be, I think, one of them you  
17     are going to see. I believe the evidence is also going  
18     to be undisputed that when kaolin gets wet, it's  
19     slippery. I think anybody that's ever been around a  
20     kaolin plant, or worked on a railroad that goes in there,  
21     knows that. And they know that they have to be extra  
22     cautious and careful, because on a rainy day when that  
23     truck, or when that car of kaolin goes through the big  
24     blower, if it's wet, it's not going to really blow it  
25     off. Now there will be some evidence that maybe if it

1           goes down the road a while, it just kind of blows it off,  
2           and sometimes -- I think evidence is going to be that  
3           sometimes the Grace and Company employees would not blow  
4           it off right or wouldn't do a good job, and sometimes Mr.  
5           Kirkland said, he just would stop and make them blow it  
6           again, and they would do that again, and maybe that would  
7           be better. And then sometimes if it goes down the road,  
8           kind of like driving down the road in your car with the  
9           pollen on it, and some of it kind of blows off. But  
10          there again, when it's wet, it will either wash off, or  
11          if it doesn't wash off, it will just kind of stay there  
12          until it's dry enough to blow off. Now, the evidence, I  
13          think, is going to show that Mr. Kirkland has been  
14          working that very job for about eight years before then.  
15          And I think the evidence is going to show that he  
16          respects the fact that he's dealing with a substance  
17          there that when it is wet you have to be very cautious.  
18          He has testified that he would instruct the new people  
19          that come on board with the railroad that, you know, you  
20          have to watch out for that. You will hear about some  
21          complaints, and I think some of the evidence will be that  
22          there were some walkways around there seven or eight  
23          years ago that weren't paved, and they just had kaolin  
24          around, so when the railroad employees would get out and  
25          kind of walk around there, their shoes would get in

1           there. Now, after that situation, the kaolin company  
2           paved some of those areas there. Now, this is some of  
3           the history, I don't know what, they say it's going back  
4           and talking about six or seven years ago, that'll -- you  
5           will hear some evidence about that. But the evidence is  
6           going to show that on that date, on Friday, February the  
7           23rd of 1998, it was raining. Mr. Kirkland and his crew,  
8           he was the conductor, went out to make a pick up from the  
9           kaolin company. They picked up the cars there, and they  
10          took them about eight or ten miles up to Warrenton,  
11          South Carolina, and at that point, they were cut off from  
12          the train and left there. And when the cars got to  
13          Warrenton [sic], Mr. Kirkland was disengaging the brake,  
14          and I think they call it throwing the brake switch, and  
15          he testified that either his hand slipped, he has on a  
16          glove there, on the wheel, or his foot slipped, he wasn't  
17          sure, but he fell. There were no witnesses there, but  
18          that's -- he says he fell, he hurt his hand, he said his  
19          back hurt. And he got up and brushed himself off, and I  
20          think some people came around. He said, well, I -- you  
21          know, I think I'm pretty -- all right, kind of shook up a  
22          little bit, and he finished out the day's work. The  
23          evidence then will show that he did what he was supposed  
24          to do. There is another rule in this book that every one  
25          of them know, and that is, if you ever encounter any sort

1           of injury, even though, maybe at the time, you don't  
2           think it's anything, you make a report, that's what you  
3           should do. He goes back and he makes a handwritten  
4           report, that you will have in evidence, describing what  
5           happened. And then the evidence will show that if  
6           there's ever any question about any equipment, he was on  
7           equipment, then there is an investigation in to see if  
8           anything is wrong with that, and that's exactly what  
9           happened here.. You will have the notes of the  
10          investigation that says, you know, there is nothing wrong  
11          with the railroad equipment, and does say that there was  
12          some of that Kaolin stuff on there, and you will have  
13          those documents in evidence. Now, the evidence will show  
14          Mr. Kirkland went with them and showed them exactly what  
15          happened and that sort of thing, and Mr. Chapman and the  
16          other officials that make up this team were there. Now,  
17          that was on Friday. The evidence will show, contrary I  
18          suggest, to what Mr. Wettermark is saying -- and of  
19          course, neither of us were there, you will have to hear  
20          the witnesses, but Mr. Kirkland's own testimony on  
21          deposition was that Mr. Chapman said, do you need to go  
22          to a doctor. And he said, no, I think I will be all  
23          right. And he said, I will put some ice on here, and  
24          take some Tylenol, and all this sort of stuff, he said, I  
25          think I will be all right. And they said, well, we will

check. It's a weekend, I'll rest up over the weekend,  
see if I am able to come back to work. I will -- if not,  
then we will go to a doctor. That was the way the thing  
was left. I invite your close attention to that  
testimony. The evidence, I think, is going to be that on  
Monday morning Mr. Kirkland returns to work, he has met  
there with the people. He says, yes, I am feeling  
better, I am going to try to, you know, make this thing.  
Said, I took the Tylenol, and what have you. I rested  
over the weekend. My hand is still hurting some, and  
that sort of thing, you will hear about it. And I think  
the evidence will show that that was another rainy day,  
that they went to the Grace and Company plant, and here  
is a -- definitely a dispute in the evidence, if the  
evidence is what Mr. Wettermark said, because you will  
hear Mr. Chapman's testimony about this, and Mr. Chapman  
will say he never had a conversation with this conductor  
when that conductor said, what do I do with the cars, and  
that would be highly irregular. Under the rules, the  
conductor is the man charged with making these decisions.  
But in any event, later that Monday, Mr. Kirkland is  
there on a car, and he doesn't -- I think, as he  
described it, he kind of slid, but he slid and he hurt  
his back again. And he had some people there watching,  
and he said, you know, you saw that, I slid on this

1           stuff, it's slippery. And I submit to you if you do  
2           that, then you will probably slide. But he did that, and  
3           he jammed his back again, hurt his back again he says.  
4           Fills out another injury complaint, again, on the 26th,  
5           that would be on Monday. I think the evidence is going  
6           to be that Mr. Chapman and the other people there said,  
7           well, do we need to go to the doctor, now. And he said,  
8           well, let's give it maybe until in the morning and just  
9           see how I feel in the morning. He felt no better, so he  
10          said, yes, and they went the doctor. I think, actually  
11          Tuesday morning, instead of Monday afternoon. I think the  
12          doctor x-rayed a hand, back, gave him some medication,  
13          saw that there was nothing broken on that -- those  
14          x-rays, and said, if you need further medical service get  
15          transferred to an orthopedic doctor, or hand doctor,  
16          something like that, and that is exactly what happened.  
17          In this case, members of the Jury, you will have the  
18          video depositions of these doctors that were involved in  
19          treating Mr. Kirkland. You will have the deposition of a  
20          Dr. Duncan over in Augusta, who was a hand specialist,  
21          who testified about treating the hand, which at the first  
22          was the main complaint. Then you will have the testimony  
23          of a Dr. Eisenberg, who was a neurologist in Aiken, South  
24          Carolina, and then you will have the testimony of Dr.  
25          Epstein. Dr. Epstein is a neurosurgeon. He is the one

1           that they refer things to when it's really complicated,  
2           when nobody else can find anything that shows up on the  
3           x-rays or anything like that. And of course, I invite  
4           your close attention to all of that testimony, but  
5           particularly to Dr. Epstein's testimony, and to his  
6           reports to the arthritic condition that he found on first  
7           examination in Mr. Kirkland's back, and when he testified  
8           that that condition occurred. Now, that will be in his  
9           testimony and what he related it to. There is another  
10          doctor in Augusta, Dr. Downey, who testified, and he is  
11          the pain doctor that prescribes the medication and so  
12          forth, you will hear his testimony.

13          Now, members of the jury, what I have discussed, up  
14          until this point, has been evidence of liability. And as  
15          the Judge says, I think will charge you, and as Mr.  
16          Wettermark has referred to, there are two elements in  
17          this case. The first is the issue of liability, and the  
18          burden the Plaintiff has, he has to show that these  
19          injuries were -- happened because of the negligence of  
20          the railroad, the negligence of the railroad. Now, there  
21          will be another issue in the case that Judge Adams will  
22          charge you about, will be the Plaintiff's own  
23          contributory negligence. What, if anything, did the  
24          Plaintiff -- was the Plaintiff negligent, that will be  
25          another issue that you will wrestle with during that

1 trial. Now, with respect, though, to the second element,  
2 that is, the element of damages, I believe Judge Adams  
3 will charge you that the law of Georgia is that when  
4 someone is injured by someone else's fault and is  
5 claiming money damages, that there is the duty and the  
6 law of Georgia imposes the duty, to do what they call  
7 mitigate, that's the term they use, which means lessen  
8 the damages.. And that would be in the case of if you are  
9 claiming damages in terms of lost wages, you would  
10 mitigate that taking employment that was offered, that  
11 sort of thing. Now, I invite your close attention again,  
12 members of the Jury, to what each of the doctors say when  
13 they are asked the question, can Mr. Kirkland return to  
14 work, and if so, what kind of work. Now, it will be  
15 undisputed that the doctors will say, well, not if it's  
16 that kind of work he was doing, climbing up and all that,  
17 that's out the window. If he hurts as bad as he says,  
18 then he should not be doing that. And they will say  
19 that, and that's accepted. But they will also go one  
20 step further, and they will say, it would even be good  
21 for him -- you know, nothing to do with mitigation of  
22 damages, but good for him, if he would go ahead and  
23 accept employment; and the doctor even uses the term, in  
24 a clerk position, in a clerk position. Now, in this  
25 regard, Norfolk Southern does have a Vocational

1                   Rehabilitation Program for its employees. You will hear  
2                   testimony from Mr. Michael Maher from Virginia, who is  
3                   the head of that department, and he will testify, and  
4                   have the correspondence and the evidence about what  
5                   efforts the railroad has gone to to try to place Mr.  
6                   Kirkland in another position. And what you will hear, in  
7                   addition to several different propositions about  
8                   employment, maybe some way off, but also some in Atlanta,  
9                   Georgia. There will be papers that will show that there  
10                  were 11 clerical vacancies in the centralized yard in  
11                  Atlanta. And what the -- I think the evidence will show  
12                  the centralized yard meant that they took some positions  
13                  from Macon, from Augusta, from wherever, centralized  
14                  those clerk functions in Atlanta, I guess computers and  
15                  whatever makes good sense -- I guess it may be like the  
16                  lady this morning talking about the bank centralizing  
17                  some thing up in McDonough. It's the same sort of  
18                  proposition. They had 11 vacancies. He says, well, I'm  
19                  taking all this medication. He submits it to the medical  
20                  director, I think the evidence is going to be that the  
21                  medical director says that's fine, he can hold any of  
22                  those. Now, you will hear the evidence, and of course,  
23                  Mr. Kirkland will give his reasons as to why he couldn't  
24                  or wouldn't take those jobs. You will further hear  
25                  testimony from a Ms. Bookman, who is a vocational

1                   rehabilitation counselor with GENEX, that's a company --  
2                   a private company in South Carolina, it's not related at  
3                   all to the railroad, but they are in the business of  
4                   finding positions for people who are either displaced in  
5                   their job or looking to change careers and so forth. The  
6                   evidence will be that the railroad, then, when they  
7                   couldn't find where they don't have any clerkship jobs  
8                   right there, that or the nearest, wouldn't take that,  
9                   well, let's try to get something outside of the railroad.

10                  He has had monthly meetings with her and you will hear  
11                  her testimony and you will see her records, and it will  
12                  be almost in every monthly record, the statement, I am  
13                  having a difficult time locating employment, here are  
14                  these five or six jobs, but Mr. Kirkland says he can only  
15                  work part time. Now, I invite your attention to the  
16                  medical testimony, and I submit no doctor in this case is  
17                  going to make that statement, that he has got to be on a  
18                  part-time basis. They are talking about lighter work,  
19                  but not lighter hours. And she says, for that reason,  
20                  it's very hard to make these placements. Now, you will  
21                  have all that evidence before you, and of course, Mr.  
22                  Kirkland will explain why it is that he said that, why he  
23                  couldn't take these jobs for various reasons, and there  
24                  were some other reasons he gave other than just that that  
25                  he will tell you about. But now, there is one other

1 fact, I think, that is undisputed, but I think relevant  
2 in this case is; although Mr. Kirkland has seen many  
3 doctors on many occasions, there has never been any sort  
4 of surgery procedure performed, and I invite your close  
5 attention as to why the doctors say that there has been  
6 no surgery performed.

7 So members of the Jury, I thank you very much for  
8 your attention, and I invite your attention to the  
9 evidence as it unfolds and I say, the Plaintiff now goes  
10 first with his case, when he finishes the Defense will  
11 offer their case. Thank you so much.

12 =====

13 THE COURT: Mr. Wettermark, call your first  
14 witness.

15 MR. WETTERMARK: Mr. Williamson.

16 LEE GENE WILLIAMSON

17 Witness having been first  
18 duly sworn, testified on

19 DIRECT EXAMINATION

20 BY MR. WETTERMARK:

21 Q Can you tell us your name, please?

22 A Lee Gene Williamson.

23 Q Mr. Williamson, where do you live, sir?

24 A Live at 1119 Dunbar Road, West Columbia, South  
25 Carolina.

1 Q And who do you work for?

2 A Norfolk Southern Railroad.

3 Q How long have you worked for the railroad?

4 A Twenty-eight years.

5 Q Tell this jury a little bit about your railroad  
6 background. Are you the first generation railroader in your  
7 family?

8 A Yes, sir, I am. No, sir, I am not. No, sir.

9 Q Who, before you, worked for the railroad in your  
10 family?

11 A My father, my father-in-law, and his father.

12 Q How far back does that go?

13 A Back to 1917.

14 Q Tell us a little bit about your background. First  
15 of all, when did you go to work for the railroad?

16 A I went to work with the railroad in 1973.

17 Q What did you do before that?

18 A I was in the Air Force.

19 Q For how many years?

20 A Twelve years.

21 Q What did you do in the Air Force?

22 A I was a flight engineer on 141s and 130s.

23 Q When you hired on with the railroad what job did you  
24 hire on as? What did you start off as?

25 A I started off as a trainman.

1 Q And did you receive any promotions from that  
2 position?

3 A Yes, sir. I went from a trainman to a conductor,  
4 and then to an engineer.

5 Q So you have worked all three jobs --

6 A Yes, sir, I have.

7 Q -- during your career?

8 A Yes, sir.

9 Q Where have you worked?

10 A I worked out of Andrews Yard in Columbia, South  
11 Carolina. I worked out of Spartanburg/Greenville Hane Yard,  
12 and worked out of Augusta, Georgia.

13 Q Is that called the Piedmont Division, Columbia  
14 District of the Railroad?

15 A Yes, sir. Piedmont Division, Columbia.

16 Q Is that -- Columbia, Greenville/Spartanburg,  
17 Augusta, that forms like a little triangle there in South  
18 Carolina?

19 A Yes, sir. That's correct.

20 Q Spent your whole career working in that triangle  
21 area?

22 A Yes, sir.

23 Q The railroad has hubs at each of these places?

24 A Yes, sir. Switching yards.

25 Q Switching yards, that's a technical term. Can you

1 explain to the members of the jury what a railroad man does, a  
2 trainman, a conductor?

3 A Trainman, conductor is responsible for getting the  
4 train together at these hubs, putting the train together,  
5 going out on a line of road, placing the cars, satisfying the  
6 customer.

7 Q Let me take it this way. There's three men on a  
8 crew?

9 A Yes, sir, that's correct.

10 Q The engineer, what does he do?

11 A Engineer operates the engine.

12 Q Kind of like drives the engine?

13 A Drives the engine.

14 Q The conductor, what does he do?

15 A The conductor is responsible for satisfying the  
16 customers, placing cars and keeping them happy.

17 Q How about the trainman?

18 A The trainman is assistant to the conductor.

19 Q What type of work do they do? You told us about  
20 their overall responsibilities. Tell us a little bit about  
21 the jobs and the actual work they do during the course of a  
22 shift.

23 A The trainman and conductor is responsible for lining  
24 the switches, getting the train together, lining the air hose,  
25 putting the air on the trains so you have air brakes, seeing

1       that the cars are inspected when they go to the industry.  
2       They have got to pick up the cars and inspect them, make sure  
3       all the safety compliances are on the cars, are not broke or  
4       anything.

5           Q     Now, before you got in the Courtroom to testify, did  
6       you have a chance to look through these photographs,  
7       Plaintiff's Exhibits Numbers 1 through 13?

8           A     Yes, sir. I did.

9           Q     And do these photographs, Exhibits 1 through 13, do  
10      they fairly and accurately depict the everyday duties of a  
11      railroad trainman and a railroad conductor?

12       A     Yes, sir, they do.

13       Q     This is stuff you all do every day?

14       A     Every day.

15           MR. WETTERMARK:     Your Honor, at this time, we  
16      will offer Exhibits 1 through 13.

17           MR. GARLAND:     No objection.

18           THE COURT:     They are admitted without objection.

19           MR. WETTERMARK:     May I ask the witness to come  
20      out of the box, Your Honor?

21           THE COURT:     Yes, sir. Just as long as he will  
22      speak up loudly enough so the Court Reporter and the  
23      Jurors can hear what you have to say.

24       Q     Mr. Wettermark:     I want you to help me with these  
25      first three, but if you will hold that one kind of over there,

1 I will put this one here, and we will put the last one over  
2 here. Now, you can step over to the side now, see if we can  
3 do this. Tell us, what do these three photographs depict?

4 A This depicts a conductor, or a brakeman getting  
5 ready to throw the switch.

6 Q Explain what he is doing.

7 A The first switch, he is in the proper position of  
8 lining up the switch. The next position, he is lifting the  
9 ball of the switch up to change the direction of the cars or  
10 the engine to travel. The other one, he is swapping his --  
11 changing weight, to get over to the other side, and pushing  
12 the switch down to a complete -- the switchboard is lining up.

13 Q In like a local freight job, a local switching job,  
14 how many times a day does a trainman have to do that?

15 A I would say on a local day where you stay out,  
16 between 75 and 100 times a day.

17 Q Plaintiff's Exhibit Number 4, tell us what is  
18 depicted in this photograph.

19 A This is a brakeman, or a trainman, tying the car  
20 down, applying brakes on the car.

21 Q This is the hand brake?

22 A Yes, sir, this is the hand brake.

23 Q How many times do you have to do that, say, in the  
24 course of a day on a local switching job?

25 A I would say, if you are on a local that's got a lot

1 of stops, you are going to do it from 75 to 100 times a day.

2 Q Exhibit Number 5, is this what is known as a high  
3 hand brake?

4 A Yes, sir. This is a high hand brake. He is in a  
5 position to put the high hand brake -- to put the brake on the  
6 car, so while they're sitting they won't move.

7 Q Exhibit Number 6, explain to us what this gentleman  
8 is doing in this photograph.

9 A When you cover your cars up, you always line your  
10 air hose, you have got to turn this, that's what supplies air  
11 to each one of the cars from the engine, that puts air brakes  
12 on the cars.

13 Q Why do you need -- the brakes on trains are air  
14 operated?

15 A Yes, sir.

16 Q Where is the source of the air for the brakes?

17 A It comes from a reservoir on the engine.

18 Q And then it goes down through these hoses all the  
19 way through the train?

20 A Right.

21 Q Do you have to make this connection between every --  
22 every car?

23 A Yes, sir.

24 Q Exhibit Number 7, can you tell us what is depicted  
25 in that, sir?

1           A     These couplings they're holding between the cars,  
2     he's turning the air in, put the air to the cars.

3           Q     Can you tell us what is depicted in Exhibit Number  
4     8? What is he showing us there?

5           A     This is called the cut lever, and when he pulls this  
6     cut lever it opens the knuckle here, and the knuckle has got  
7     to be open to make a coupling. If there was a car coupled up  
8     to this, he's opening this knuckle to separate the cars.

9           Q     In railroad terminology, what do you call these  
10    grips around here to hold on to?

11          A     Ladder lungs.

12          Q     Same thing that we do in regular life?

13          A     Right.

14          Q     When you all talk about grab irons, what does that  
15    mean?

16          A     The grab irons is this, this is grab irons on the  
17    side.

18          Q     Exhibit Number 9, can you tell us what is depicted  
19    in that?

20          A     The brakeman and the conductor is in position and he  
21    is pulling the cut lever to pull the knuckle open.

22          Q     Exhibit Number 10, explain what he is doing in this  
23    photograph.

24          A     He is opening the knuckle, but he appears to be  
25    closing the knuckle.

1 Q Are there times when you have to adjust draw heads,  
2 the movement of them from side to side?

3 A Yes, sir. At times when you are going to make a  
4 coupling in a curve you have got to shift this draw head over  
5 so the knuckle is going to be open and they will couple up and  
6 the pin drops.

7 Q That's called adjusting the draw head?

8 A Yes, sir.

9 Q Let me take a few of these off here. And then let  
10 me take you through the last few. Exhibit Number 11?

11 A The conductor, trainman is mounting the car.

12 Q Again, you all typically wear gloves out there?

13 A Yes, sir. Yes, sir.

14 Q Exhibit Number 12, what does that depict?

15 A The trainman and conductor is on the side ladder  
16 riding the car out of the track.

17 Q Do you all have to ride on the side of moving cars?

18 A Yes, sir, we do.

19 Q For how great a distance?

20 A Sometimes it could be as much as a car length to  
21 make a coupling, sometimes it could be as much as half a  
22 mile or mile.

23 Q And then finally, Exhibit Number 13?

24 A This shows a man dismounting a moving boxcar.

25 Q Now, you all don't have to do that anymore, though,

1 do you?

2 A No, sir. We do not.

3 Q That is something that they have stopped?

4 A Yes, sir.

5 Q But for years you all did that?

6 A Yes, sir.

7 Q Pretty physical work?

8 A Yes, sir.

9 Q You can go back to the witness stand. In all these  
10 things you have just showed us, all these duties that you just  
11 showed us that are done on a daily basis, can you explain to  
12 us how important is it to a railroad man, a trainman, a  
13 conductor, how important is it to you to have good hand holds,  
14 to have good foot holds?

15 A It's very important that you have good hand holds,  
16 it could mean life or death or loss of limb.

17 Q Why is that, sir?

18 A Because you could catch up on a car, if the grab  
19 irons was not -- hadn't been inspected, was rusted or going to  
20 break off, you could fall back over, your legs could fall  
21 across the track, you could be run over, it could cause your  
22 death.

23 Q You men rely upon these grab irons for your safety?

24 A Yes, sir.

25 Q Are you familiar with the W. R. Grace plant near

1 Aiken?

2 A Yes, sir, I am.

3 Q How long have you had opportunities to work at that  
4 facility?

5 A Out of my 28 years, probably 20 years.

6 Q I want to bring you forward in time and talk just  
7 about the 1990s. Did you work that job on a regular basis in  
8 the 1990s?

9 A Yes, sir. From about '92 to '97 I worked it every  
10 six months.

11 Q You would work it six months out of the year?

12 A Yes, sir.

13 Q Why did you not work it the full 12 months?

14 A They was two divisions that had the job and the  
15 Piedmont Division had it for six months, from December to May;  
16 and the Carolina Division had it from May to December.

17 Q You are on the Piedmont Division?

18 A I am on the Piedmont division.

19 Q So you only got to work it for six months a year?

20 A That's right.

21 Q But you worked it continuously from '92 up through  
22 '96 or '97?

23 A Yes, sir, that's correct.

24 Q The -- I want you to describe to us just a little  
25 bit what work is done and how this job works, this Aiken local

1 job, how it works.

2 MR. WETTERMARK: And again, may I have him come  
3 down here and use the diagram?

4 THE COURT: Yes, sir.

5 A The Witness: The Aiken local goes on duty every  
6 morning five days a week, Monday through Friday, at Aiken  
7 South Carolina. The first thing we do when we go on duty at  
8 7:00 o'clock, we will go to what they call a swap track and  
9 switch out empty hoppers that go to W. R. Grace. Most of the  
10 time we would go work W. R. Grace first thing in the morning,  
11 and once in a while -- this clay mine here is closed, but this  
12 here, we will go to Southeast -- maybe once or twice a month,  
13 but most times it's W. R. Grace every day.

14 Q Now, at W. R. Grace, what type of cars do you  
15 deliver there, and what type do you take out?

16 A We take empty hoppers to W. R. Grace and pull the  
17 load out of W. R. Grace, which is hoppers.

18 Q And that's always the first job in the morning?

19 A Yes, sir.

20 Q After you have finished working -- this is called  
21 the AB line?

22 A Yes, sir, that's correct.

23 Q After you finish working the AB line, take us  
24 through the rest of the course of the day's work.

25 A After we go work W. R. Grace we will get around the

1       cars and go back to Aiken. And then we got a house track  
2       here, we will pull up here and leave the cars on the main  
3       line. A lot of times we would have cars up in the rock track,  
4       we will get them out, we will go out and work Florida steel,  
5       Owens-Corning, Metal Services, go out there and load them on  
6       the run around track. We will run around the train and get  
7       all the cars solid, we will come back to Aiken, usually it's  
8       lunch time, we'll take our lunch break. And then after that,  
9       we will go down the hill -- this is the SA side, we take all  
10      these cars down the hill, which is about six miles downhill,  
11      we go to Warrenville, which is a side. We will go down there  
12      and classify these cars, you will classify all your north cars  
13      with your south cars, because there will be a train coming by  
14      that night to stop and pick these cars up. One goes -- the  
15      south cars go to Augusta, north cars go to Columbia.

16           Q     How long -- in a typical day, how long do you do  
17      this job?

18           A     Nine to 12 hours.

19           Q     You used a term, you said, we run around the train.  
20      Explain what you are talking about when you run --

21           A     When I say run around the train, that means getting  
22      the engine from one end to the other end, it's changing  
23      directions. You have got to get the engine on the other end  
24      to take them downhill, because you couldn't shove them  
25      downhill backwards.

1 Q You prefer to pull trains instead of push them?

2 A That's right.

3 Q And so you always try to move the engine around to  
4 the front of the train?

5 A That's right.

6 Q All right, you can go back to your witness chair,  
7 sir.

8 (Witness complies.)

9 Q Well, I lied. I need you down one more time.

10 THE COURT: You may step down.

11 Q Mr. Wettermark: I'm just going to use this thing  
12 again one more time. I'll take this down. You have had a  
13 chance to review these photographs before?

14 A Yes, sir, I have.

15 Q These are all photographs of the W. R. Grace  
16 facility?

17 A That's right.

18 Q Has this facility -- has it looked just like this  
19 the entire time we are talking about?

20 A Yes, sir, it has.

21 Q And so these photographs, they are a fair and  
22 accurate depiction of that facility?

23 A Yes, sir. That's right.

24 Q Tell us what we are looking at, Exhibit Number 30?

25 A This photo was taken looking back up the main line

1 back towards Aiken, South Carolina. This here shows -- if I  
2 look at it right like this, -- it shows this plant has just  
3 been completed, because all these that sit up here and the  
4 train crew that's done left the facility.

5 Q The cars that we see on this end of the facility,  
6 these are the empties?

7 A Yes, sir, that's right.

8 Q Now, what goes on at these -- underneath these  
9 things?

10 A This is a loading station where they load cars and  
11 they drop the cars down this way and there's some more loading  
12 facilities down here in the plant which has got a shed on it.

13 Q The clay goes in the top of the cars?

14 A Yes, sir. There's doors that open up, and six foot  
15 and eight foot doors that fold back, and the pipes come down  
16 and fill these cars up.

17 MR. WETTERMARK: We will offer Exhibit Number 30,  
18 Your Honor.

19 THE COURT: Is there a series you have there, so  
20 we can go ahead and just --

21 MR. WETTERMARK: Let me offer them all, Exhibit  
22 Number 30, 31, 32, 33, and 34, we will offer them at this  
23 time.

24 THE COURT: Any objection?

25 MR. GARLAND: No objection.

1                   THE COURT:       Those are admitted.

2                   Q    Mr. Wettermark:     All right, tell us about 33;  
3                   what are we seeing there?

4                   A    This is the same -- approximately same position, but  
5                   you are looking toward Greenville here, Aiken side is back  
6                   this way. This shows the loading facility, down here they are  
7                   loading a truck right here, here, they got the hoppers over  
8                   here, loading the hoppers, that's their little track mobile  
9                   that they move the cars around with.

10                  Q    And really, it's not a good match, but basically, if  
11                  we put these together, that kind of gives you the --

12                  A    Right, this track here goes right back into this  
13                  track here, that's the main line.

14                  Q    Exhibit Number 32, tell us what we are looking at.

15                  A    This is a -- the lower end of the plant looking  
16                  back towards Aiken; this way would be towards Greenville.  
17                  This is loaded cars that the plant has loaded up under its  
18                  shed here and dropped down, there are two tracks right here,  
19                  and they have put them on each side. They put loads here and  
20                  loads here.

21                  Q    Exhibit Number 31?

22                  A    This is the same thing, this is the switch right  
23                  here, and this is the loading -- that is the truck up there,  
24                  this is -- the hopper has been loaded, and this car is coming  
25                  down in this track right here.

1 Q And then finally, Exhibit Number 34?

2 A This is still the bottom of the track where the  
3 loading facilities -- where they load cars, this car is going  
4 down into the plant.

5 Q Is this basically just a loading facility for clay?

6 A That's correct.

7 Q Is it kaolin clay?

8 A Kaolin clay.

9 MR. WETTERMARK: You can go back and have your  
10 seat.

11 Q Mr. Wettermark: When you were working this job  
12 from '92 up until '97, going into W. R. Grace, how often --  
13 how many days a week would you go into W. R. Grace?

14 A Five days a week.

15 Q Did you become aware of any safety problems with  
16 regard to kaolin being on the cars during this time?

17 A Yes, sir. Almost every day you would go in there,  
18 the cars would be coated with kaolin, the grab irons, the  
19 brake handles, the walkways, the top of the cars.

20 Q Did they have -- did they have any facilities there  
21 at Grace to get this stuff off, to blow it off?

22 A Yes, sir. They had an air system down the side of  
23 the building, which they could hook an air hose to and blow  
24 the kaolin off.

25 Q Would they use it?

1 A Once in a while they would.

2 Q But day in, day out?

3 A No, sir. Not day in and day out.

4 Q What did you try to do about it? Did you try to  
5 correct the situation?

6 A Yes, sir. We tried to correct the situation.

7 Q Tell us how.

8 A We would go complain to the plant manager, which  
9 was David Woods, would tell him about it, and he -- that's  
10 about as far as it would go. We would complain to the train  
11 master, the terminal superintendent, we would call an agent  
12 and tell him, he would call the trainmaster, and every day you  
13 would go back. It would be just almost the same situation  
14 every day.

15 Q Give us some names. What trainmasters?

16 A Trainmaster Mass, Mr. Roberson, Jimmy King, we've  
17 also -- Mr. Chapman.

18 Q Talking -- during this period, '92, '93, '94, '95,  
19 how -- give me your best judgment, how often were you  
20 contacting officials of the Norfolk Southern trying to get  
21 something done about the kaolin situation on the cars?

22 A I would say we would call them sometimes every --  
23 twice, three times a week.

24 Q That much?

25 A Yes, sir.

1 Q Did there come a time when you -- you worked with  
2 Mr. Kirkland on this job, didn't you?

3 A Yes, sir, I did.

4 Q Did there come a time, sir, that you and he decided  
5 you all were going to start making a record of this and do  
6 something about it?

7 A Yes, sir.

8 Q Tell us what you all decided to do.

9 A We came back to the job in December and the clay was  
10 real bad, so we decided we was going to start keeping a  
11 record, we was going to report it every day and keep a  
12 record. So every day, we would call and report to an  
13 official, or call Mr. Jimmy King, he would call, we would  
14 write it down on a calendar.

15 Q Where did you keep this calendar?

16 A In the depot at Aiken.

17 Q You started keeping it when you first came on the  
18 job in December?

19 A Yes, sir.

20 Q And did you keep it all the way through -- when did  
21 you leave, in June?

22 A Yes, sir. I left it six months later.

23 Q And you had kept this calendar the entire six  
24 months?

25 A Yes, sir, sure did.

1 Q And how many -- if you know, how many notations had  
2 you all put on this calendar by the time you left the job?

3 A Oh, it was too many to name.

4 Q Anybody ever do anything about it?

5 A No, sir.

6 Q Mr. Williamson, I have got to ask you this question,  
7 why didn't you just say I ain't going to do it?

8 A We tried that -- tried to not work the plant, and we  
9 were told that they were a good customer, we had to move the  
10 cars.

11 Q Who told you that?

12 A Mr. Mass, Mr. Roberson told us that, and Mr. Chapman  
13 told us that.

14 Q Did you go so far as to say we are not going to do  
15 it?

16 A Yes, sir, I did.

17 Q These are your bosses?

18 A Yes, sir, I did.

19 Q And they told you to do it anyway?

20 A Right.

21 Q Did you ever have a chance to actually get with  
22 them, take them out there, or be with them at the plant, say,  
23 here it is, here is the problem?

24 A Yes, sir. I have had a chance -- Mr. Roberson was  
25 there one time they had a derailment, we showed him the

1 situation. And he said, this plant sure is a mess, said I  
2 wouldn't even work it. Mr. Mass has been there several times,  
3 we told him about the situation. He would come to Aiken, we  
4 would tell him to go out there and look at the situation, it  
5 was still bad, and it would never see nothing get done.

6 Q Tell us what it's like to try to work on a car  
7 that's covered with kaolin.

8 A Well, the kaolin is so slick it's just -- it's like  
9 it's got grease in it. And when you are out there working, if  
10 you don't be real careful you are going to slide, or slip, or  
11 fall.

12 Q When you are working a car that's got the kaolin on  
13 it, have you all learned little techniques, methods, that you  
14 try to use to try to make it safer?

15 A Yes, sir, we have.

16 Q Tell the jury some of the things that you have to do  
17 to cope.

18 A Most of the men that's working to ground, or say  
19 regular men that's been on the job, has learned how to place  
20 the foot in corners to keep them from slipping, or getting on  
21 the steps or anything, and place them so the feet won't slip.  
22 But there's always -- you know, I have seen the clay on the  
23 cars from two to three inches, I've seen it on top as much as  
24 18 inches.

25 Q When it's covered with clay like that is there any

1 way you can do the job without slipping?

2 A No, sir.

3 Q Have you slipped?

4 A Yes, sir.

5 Q You said that the people at W. R. Grace, do they  
6 have to get up on these cars to do their job?

7 A They have to get on top of them.

8 Q Well, how do they do their job if it's so slick?

9 A They have got to put a restraining belt on it, and  
10 they have got a cable running over top of them. They have to  
11 hook up before they ever get on top of them.

12 Q Safety harnesses?

13 A Safety harnesses.

14 Q You were -- what was your -- were you the engineer  
15 on the job during all this time?

16 A Yes, sir, I was the engineer.

17 Q Was Mr. Kirkland doing all these same things that  
18 you have just told us about, trying to get the situation  
19 fixed?

20 A Yes, sir, he was.

21 Q You have worked with him for years, haven't you?

22 A Yes, sir, I have.

23 Q Tell this Jury what sort of trainman he was.

24 A In my opinion, Lester was one of the best  
25 conductors on the job. He was real self-conscious of his

1 job. He performed his job in a timely manner, and there  
2 wasn't a better conductor, or better person to work for.

3 Q You know what happened to the calendar, don't you?

4 A Yes, sir.

5 Q But you weren't there when it happened?

6 A That's right.

7 Q Well, I can't ask you about it then.

8 MR. WETTERMARK: That's all I have. I think this  
9 gentleman has some questions.

10 THE COURT: All right, Mr. Garland.

11 CROSS EXAMINATION

12 BY MR. GARLAND:

13 Q Mr. Williamson, let me ask you a few questions.

14 Now, you said you left that Grace job in '97?

15 A Yes, sir.

16 Q When did Mr. Chapman come to be trainmaster; do you  
17 remember that? What year was that?

18 A I can't exactly remember exactly what year it was,  
19 but --

20 Q Was it '97 or '98 or was -- or do you remember?

21 A Let me think. I believe it was the latter part of  
22 '97, I am not sure.

23 Q Now, Mr. Roberson is who? Who is he?

24 A The terminal superintendent.

25 Q All right. Now tell me this, you are familiar with

1 the operating rule book, are you?

2 A Yes, sir.

3 Q These are the Bibles, I guess, of your employees?

4 A That's right.

5 Q You have had yours since you went on duty?

6 A That's right.

7 Q And you have safety classes and talk about these  
8 various rules?

9 A That's right.

10 Q Do you know -- look at Rule 586 --

11 MR. GARLAND: May I approach the witness, Your  
12 Honor?

13 THE COURT: Yes, sir, you may.

14 Q Mr. Garland: Are you familiar with Rule 586? Are  
15 you familiar with that? Would you read that rule, please,  
16 sir?

17 A "It says, conductors must if possible remedy defects  
18 in their equipment and must remove from the consist any cars  
19 that are unsafe to run. They must report all defective  
20 brakes, hot box or other defects as well as repairs made  
21 between terminals. They must comply with instructions for  
22 reporting materials applied to cars and disposition of  
23 defective parts."

24 Q Let me ask you this question, Mr. Williamson, if a  
25 car is encountered at an industry, or anywhere, to be pulled,

1 whose responsibility is it, the engineer, the trainman or the  
2 conductor, to not -- to not move that car if it is an unsafe  
3 car? Whose responsibility would that be under?

4 A The conductor and the brakeman is jointly  
5 responsible for the cars.

6 Q Not the engineer?

7 A No, sir.

8 Q And under this rule, it says conductor, doesn't it?

9 A That's right, exactly right.

10 MR. GARLAND: I think that's all I have of this  
11 witness.

12 THE COURT: Any redirect?

13 MR. WETTERMARK: Yes, sir.

14 REDIRECT EXAMINATION

15 BY MR. WETTERMARK:

16 Q Lester Kirkland, all these years you were working  
17 with him did he do everything in his power that you were able  
18 to observe to try to correct the situation with those cars?

19 A Yes, sir, he did.

20 MR. GARLAND: I object to the leading form of that  
21 question.

22 MR. WETTERMARK: Let me withdraw the question, it  
23 was leading.

24 THE COURT: It was just a trifle.

25 Q Mr. Wettermark: Did Mr. Kirkland -- were you

1 able to observe Mr. Kirkland trying to correct the situation  
2 with these cars?

3 A Yes, sir.

4 Q Can you tell this jury anything that you can think  
5 of that he could have done more than what you saw him do?

6 MR. GARLAND: Your Honor, I object to these leading  
7 questions of his own witness.

8 THE COURT: Restate your question.

9 Q Mr. Wettermark: Can you tell us anything else  
10 that Mr. Kirkland could have done to try to correct the  
11 situation with these cars?

12 A As far as Mr. Lester -- Mr. Kirkland correcting the  
13 clay that was on the cars, that wasn't his responsibility to  
14 correct that. What the rule is reading is mechanical defects,  
15 safety effects. Just like I stated before, when he pulled  
16 cars from an industry he inspected these cars for mechanical  
17 defects, and if the cars were bad he would tell me, and I  
18 would call somebody, or we would set the car off and not move  
19 it.

20 Q You told us about this time when you told Mr. Mass  
21 that you all weren't going to move them, and he told you to go  
22 ahead and do it because, I think you said, it was a good  
23 customer?

24 A It was a good customer.

25 Q Was Mr. Kirkland there then?

1 A Yes, sir, he was.

2 Q If an official tells you -- gives you specific  
3 orders to move a car after you reported it as being a safety  
4 hazard do you have any choice in that?

5 A No, sir, we do not.

6 Q What would happen if you said, no, I ain't going to  
7 do it?

8 A Well, chances are, they would take some action  
9 against you saying you failed to follow instructions and you  
10 would be taken out of service.

11 Q They would fire you?

12 A That's exactly right.

13 MR. WETTERMARK: That's all.

14 THE COURT: Any recross?

15 RECROSS EXAMINATION

16 BY MR. GARLAND:

17 Q Mr. Williamson, you were not working that run in  
18 January of '98, were you?

19 A No, sir, I was not.

20 Q And you never heard Mr. Chapman say anything about,  
21 you have to move a car like that during that time, did you?

22 A Not in '98, no, sir.

23 MR. GARLAND: That's all.

24 THE COURT: Is that all of this witness?

25 MR. WETTERMARK: That's all.

1 THE COURT: You may step down.

2 MR. WETTERMARK: May he be released to go home?

3 MR. GARLAND: Sure.

4 THE COURT: Why don't we take a short break, it's  
5 getting close to that time, rather than -- as I mentioned  
6 to you earlier, we will try to do it between witnesses or  
7 between examinations, so we are going to take just our  
8 short mid-afternoon break. Remember, and I will remind  
9 you each time, or try to, don't talk about the case yet.  
10 I know that's what brings you all here together, and it  
11 would be natural to go back and do it, but resist that  
12 urge, don't talk about the case yet. And we will be in a  
13 short recess for our mid-afternoon break.

14 (RECESS)

15 THE COURT: Please be seated. All right, Mr.  
16 Wettermark, you may proceed.

17 MR. WETTERMARK: Your Honor, we would call Mr.  
18 Leon Joyce.

19 THOMAS LEON JOY

20 Witness having been first  
21 duly sworn, testified on

22 DIRECT EXAMINATION

23 BY MR. WETTERMARK:

24 Q Can you tell us your name, sir?

25 A Thomas Leon Joy.

1 Q Mr. Joy, where do you live, sir?

2 A I live in North Augusta.

3 Q Who do you work for?

4 A Norfolk Southern Railroad.

5 Q How long have you worked for the railroad?

6 A Almost 28 years.

7 Q What is your job at the railroad?

8 A Conductor.

9 Q That's something I want you to explain to us. Do  
10 you also hold trainman seniority?

11 A Yes.

12 Q How can you be both a trainman and the conductor;  
13 how does that work?

14 A Well, usually, when we started, you started off as a  
15 trainman, and you retain that seniority forever. You just get  
16 promoted to a conductor after years of experience as a  
17 trainman.

18 Q Even when you have been promoted to conductor, are  
19 there sometimes when you will have to go back and work as a  
20 trainman?

21 A Not have to, but by choice.

22 Q Oh, okay. So you have a choice; if you want to you  
23 can work as either a trainman or a conductor?

24 A Correct.

25 Q Why do you want to work as a conductor?

1 A It's more money.

2 Q Pretty good reason. Has a little bit more  
3 responsibility?

4 A Yes.

5 Q Is the work, though, the physical work basically the  
6 same?

7 A Yes.

8 Q In your career, have you worked the Aiken local?

9 A Yes.

10 Q Have you ever worked it on a regular basis?

11 A Yes.

12 Q When was that?

13 A Regular, early '90s.

14 Q Can you give us your best judgement of what years it  
15 was?

16 A '91, 2, 3, 4.

17 Q When you worked it, did you work it at half a year  
18 at a time or did you work it the full year at a time?

19 A I worked it the full year.

20 Q Would you have the same engineer for the whole year?

21 A No.

22 Q Do you remember who your engineers were back at that  
23 time?

24 A Six months, I would have Lee Gene Williamson; and I  
25 think six months, I would have David Hall.

1 Q When you worked the Aiken local job did you all  
2 switch W. R. Grace?

3 A Yes.

4 Q How often?

5 A Usually every day.

6 Q Can you tell us during that period of time, that  
7 three or four year period of time when you worked the job  
8 regular, what the situation was with the cars coming out of W.  
9 R. Grace with regards to clay on them?

10 A It always had some clay on them.

11 Q Tell us what you are talking about when you say it  
12 had some clay on them.

13 A Sometimes it would be piled up a foot high,  
14 sometimes just an inch.

15 Q How could it -- where would it pile up a foot high?

16 A On top.

17 Q How about the grab irons and the ladders would it  
18 accumulate on those?

19 A Yes.

20 Q Would that create a safety problem for you as a  
21 trainman or conductor?

22 A Yes.

23 Q How so?

24 A It's -- gets slippery, slick.

25 Q I know it's hard to put things like slippery and

1 slick into words, but can you describe for the members of the  
2 Jury, just to the best of your ability, what it was like to  
3 try to work on a car where the grab irons and the footholds  
4 and walkways were coated with the kaolin?

5 A It would be slick, like maybe pouring oil on them,  
6 and trying to step on them.

7 Q Is it slick even when it's dry?

8 A Yes.

9 Q How about when it's wet?

10 A It's worse, more slick when it's wet.

11 Q I asked you if you considered it a safety problem;  
12 did you consider it a safety problem?

13 A Yes.

14 Q Did you try to get something done about it?

15 A Yes.

16 Q What?

17 A Usually we would tell the agent, the local agent.

18 Q Who was that?

19 A That would have been Mr. Jimmy King.

20 Q He was the agent at the Aiken depot?

21 A Aiken depot, that's our local agent.

22 Q Who else did you talk with?

23 A Would talk with Trainmaster John Mass.

24 Q He was the trainmaster at that time?

25 A Right.

1 Q Is he a company official?

2 A Yes.

3 Q Is he over you?

4 A Yes.

5 Q Anybody else that you can remember talking to?

6 A And the supervisor at the plant.

7 Q You actually talked to the people at Grace?

8 A Yes.

9 Q Was anything ever done about the clay being on the  
10 cars?

11 A Once in a while.

12 Q Explain what you mean by that.

13 A If you got on them and -- or told your boss to get  
14 them to clean the cars off, they would clean them off, or try  
15 to, as much as they could.

16 Q For how long?

17 A A day or two.

18 Q And then what would happen?

19 A Then it would go back to the same piling up, not  
20 cleaning them off.

21 Q Can you give us your best judgement, how often did  
22 you personally talk with someone from the railroad about the  
23 situation down there at Grace with the clay on the cars?

24 A How often?

25 Q Yes. Were you doing it once a day, once a week,

1 once a month, once a year?

2 A Probably at least with an official, probably at  
3 least once a month.

4 Q Throughout the entire time that you were there did  
5 they ever fix the problem?

6 A Not fix.

7 Q I have got to ask you this question, if having this  
8 clay on these grab irons was such a -- was a safety problem  
9 why didn't you just refuse to do it?

10 A Probably scared for my job.

11 Q Were you ever given specific instructions by an  
12 official to switch them, even after you told them about the  
13 problem?

14 A Yes.

15 Q When you gentlemen work out there what do you wear  
16 on your hands?

17 A Gloves.

18 Q When you get this kaolin on your gloves, tell us  
19 what effect that has.

20 A It's -- the clay stays on your gloves, you never get  
21 it off, and it causes you to -- a grip problem.

22 Q Frank just mentioned this to me. Explain -- you  
23 used the term, when we switch cars, what do you mean when you  
24 talk about when we switch cars?

25 A You either take loads out of an industry or put

1       loads in the industry. This particular industry, you would  
2       take loads out and put empties in.

3           Q     And in the process of doing the switching the cars,  
4       pulling the loads out, putting the empties in, do you and the  
5       other groundmen, the conductor and the trainman, do you have  
6       to climb up and down on the cars?

7           A     Yes.

8           Q     Up and down the ladders?

9           A     Yes.

10          Q     Across walkways?

11          A     Yes.

12          Q     Let me show you what I will identify as Exhibit 37.  
13       Do you know what this is? Is this kaolin?

14          A     Looks like it.

15          Q     I will wait and let someone else put that into  
16       evidence. You worked with Lester Kirkland, didn't you?

17          A     Yes.

18          Q     Would you tell the Jury what type of trainman he  
19       was, what type of conductor he was?

20          A     He was a good conductor.

21          MR. WETTERMARK:     I think that's all I have, Mr.  
22       Joy. Thank you for your time.

23          THE COURT:     Mr. Garland?

24          MR. GARLAND:     May it please the Court?

25          THE COURT:     Yes, sir.

## CROSS EXAMINATION

2 BY MR. GARLAND:

3 Q Mr. Joy, let me you ask you just a few questions  
4 now. You say you worked that job from '91 to '94?

5 A Yes.

Q Do you know Mr. John Chapman?

7 A Yes.

8 Q When you were working the job whose responsibility  
9 was it for trying to blow off the kaolin, was it the  
10 railroad's or W. R. Grace and Company employees?

11 A W. R. Grace.

12 Q And you say, when you would -- who would you talk to  
13 -- you mentioned you would talk to somebody there at W. R.  
14 Grace, and then for a few days it would get a little better;  
15 who was that gentleman?

16 A Been a supervisor --

17 Q Mr. Woods?

18 A David Wood.

19 Q Was he kind of the man in charge of the place there,  
20 the supervisor?

21 A That's correct.

Q Did you see him almost every time you went?

23 A Yes.

24 Q Did you have occasion to have them come back and  
25 blow some off? Did you have occasion to point out to them,

1 look, they didn't blow that car good enough, do it again? Did  
2 you ever do that?

3 A I didn't understand the question.

4 Q Was it ever an occasion when you would go to Mr.  
5 Woods and say they didn't blow these cars off at all, and he  
6 would say, well, just leave them there a minute and let us get  
7 somebody out there to do it? Did that ever happen?

8 A No.

9 Q Would he not be there, or why wouldn't you report it  
10 to him, if there was some clay left on the cars?

11 A I would.

12 Q Oh, you would. But would he just say he wasn't  
13 going to blow it anymore?

14 A Right.

15 Q Had it already gone through the little blower?

16 A If at all.

17 Q Has the blower always been there?

18 A Not always.

19 Q Do you remember when they installed the blowing  
20 mechanism?

21 A No, I don't.

22 Q Did they have any way to blow it off before then, or  
23 do you know?

24 A They used to wash it off with water.

25 Q Did they decide blowing was better?

1 A Yes.

2 Q Now, is it true that if they don't blow it, or don't  
3 do a good job in blowing it, if you are going down the road,  
4 does some of it blow off into the fields along side?

5 A Yes.

6 Q Do you recall back when they didn't have the paving  
7 out at Grace and Company on the walkways?

8 A Yes.

9 Q Now, you all complained about that, did you not?

10 A Yes.

11 Q Did you complain to Mr. Roberson about that?

12 A I don't think Mr. Roberson.

13 Q Did you complain to Mr. Roberson at all about any of  
14 this; do you remember?

15 A I don't think I did, personally.

16 Q I am just asking what you did. And when did they do  
17 the paving? Do you remember a point in time when that was  
18 accomplished?

19 A I can't recall that time.

20 Q Did that help some as far as sloshing around in the  
21 kaolin on the ground?

22 A Some.

23 Q Were they supposed to blow off the walkway, too?

24 A Yes. They were -- would try to scrape it with a  
25 little --

1 Q That was the railroad employees or the Grace and  
2 Company employees?

3 A Grace.

4 MR. GARLAND: That's all we have.

5 THE COURT: Any redirect?

6 MR. WETTERMARK: No, sir. Thank you, Mr. Joy.

7 THE COURT: May he be excused?

8 MR. GARLAND: He may.

9 MR. WETTERMARK: Mr. Kirkland, Lester.

10 LESTER KIRKLAND

11 Witness having been first  
12 duly sworn, testified on

13 DIRECT EXAMINATION

14 BY MR. WETTERMARK:

15 Q Could you tell us your name?

16 A Lester Eugene Kirkland, Jr.

17 Q Mr. Kirkland, where do you live?

18 A In Cross Hills, South Carolina.

19 Q How old are you?

20 A 45.

21 Q Can you tell us your date of birth just for the  
22 record?

23 A May 19th, 1955.

24 Q Were you born and raised there in South Carolina?

25 A Yes, sir.

1 Q Ever lived anywhere else in your life?

2 A No, sir.

3 Q Your family live there?

4 A Yes, sir.

5 Q Who all -- tell me who all lives there.

6 A My dad, my brother, my sister, and their families,  
7 naturally, my nephews, my uncle and his wife, my aunt, and  
8 then my ex-wife -- you know, we got divorced, but -- and my  
9 stepdaughter that I am real close to. So really all my  
10 family.

11 Q I want to find out just a little bit about your  
12 education. How far did you go in school?

13 A Just high school, 12th grade.

14 Q Did you graduate?

15 A Yes, sir.

16 Q From which high school?

17 A Southside High School.

18 Q In which town?

19 A Greenville.

20 Q When was that, when did you graduate?

21 A 1974.

22 Q Well, then tell me about your work background; how  
23 old were you when you started working?

24 A I was probably 14 or 15 when I first started  
25 working.

1 Q What type of work did you do then?

2 A Like pumping gas at a Union 76 Truck Stop and  
3 working at a Scrub-Dub Car Wash most of the time. I think I  
4 started with the Scrub-Dub Car Wash, like washing the cars  
5 before they went through the line first.

6 Q When would you do this type of work?

7 A After school and on the weekends.

8 Q Did you pretty much work throughout your high school  
9 years?

10 A Yes, sir.

11 Q What about when you got out of high school, what was  
12 your first full-time job?

13 A Bi-Lo Warehouse Food Stores.

14 Q What did you do there?

15 A Pulled orders that they loaded the trucks, like for  
16 a store, what they ordered. I would go and get it and put it  
17 on little carts and then they would send it to the store. And  
18 then I was trying to learn to drive a forklift, you know, and  
19 start driving a forklift for them.

20 Q How long did you work at the Bi-Lo Warehouse?

21 A Less than a year -- I think six months to a year.

22 Q Why did you leave them?

23 A I got hired by Norfolk Southern, by Southern  
24 Railway.

25 Q How long had you wanted to work for the railroad?

1 A Since I was four or five. My dad, he was a  
2 conductor, and --

3 Q How long did your father work out there?

4 A About 43, 44 years.

5 Q For Norfolk Southern?

6 A Yes, sir.

7 Q I guess back then it was called Southern?

8 A It was Southern Railway and Norfolk and Western. We  
9 were the old Southern Railway, and they merged in 1982, I  
10 think it was '82, and called it Norfolk Southern.

11 Q What was the year -- what year did you hire on the  
12 railroad?

13 A 1975.

14 Q Was your father still working there when you hired  
15 on?

16 A Yes, sir.

17 Q What job did you hire on as?

18 A As a trainman.

19 Q Were you promoted to conductor?

20 A Yes, sir.

21 Q When?

22 A 1978.

23 Q In which division of the railroad did you hire on?

24 A In Columbia, Columbia district.

25 Q Have you -- ever since you hired on in '75 and got

1 promoted to conductor in '77, have you held the trainman and  
2 seniority -- trainman and conductor seniority ever since?

3 A I gave the conductor's up one time in -- like in  
4 '78, right at the end of '78, and then took it right back  
5 like the next day. They had a test the next day, and my dad  
6 said, you messed up, you should keep that conductor's, because  
7 everybody else was giving up their trainman, so I took it  
8 right back and I never really lost the position or anything.  
9 So I -- yes, sir, I have held a trainman and conductor the  
10 whole time.

11 Q I don't want to get into all the details of the  
12 railroad seniority system, but am I correct that basically you  
13 all work under a seniority system?

14 A Yes, sir, that's correct.

15 Q The longer you have been there the better choice of  
16 jobs you have?

17 A That's right. You could pull whoever is younger  
18 than you.

19 Q During your railroad career did you also for a time  
20 work as a dispatcher?

21 A Yes, sir, from 1986 to 1992.

22 Q Why did you work as a dispatcher?

23 A Trying to -- I wrote a letter, you know, to try to  
24 move up with the company, and I was trying to learn different  
25 aspects, and trying to better myself.

1 Q When you worked as a dispatcher, did you give up  
2 your trainman and conductor's work?

3 A No, sir.

4 Q How could you do both?

5 A It was hard, but I worked a train during the week,  
6 and then I was just like an on-call dispatcher working the  
7 weekends, on like second or third shift or something on the  
8 weekends.

9 Q Did there come a time though when you gave up that  
10 dispatcher's work?

11 A Yes, sir, in '92.

12 Q Why?

13 A It got too hard. I got married, and it was a long  
14 way, it was like two and a half hours, almost three hour drive  
15 one way. And I really love the outdoor work. I loved my  
16 conductor's job, and that was -- I had to -- it was getting  
17 too hard to do both, and so I had to make a decision.

18 Q Tell me, on the Piedmont division, Columbia  
19 district, where are the major hubs, major yards?

20 A Columbia, South Carolina; Greenville/Spartanburg  
21 area; and Augusta, Georgia.

22 Q Have you worked in that area your whole career?

23 A Yes, sir.

24 Q You told me that when your dad -- you say your dad  
25 was still working for the railroad when you hired on. Did you

1 ever have a chance to work with him?

2 A Yes, sir.

3 Q For how long?

4 A Twelve years.

5 Q You worked the same job with your father for 12  
6 years?

7 A Yes, sir.

8 Q How was that?

9 A It was tough. It was a little harder on me than --  
10 he said you are going to usually learn to do it right, so --  
11 but I enjoyed it, I love -- you know, he was good and I loved  
12 it and --

13 Q I want you to tell us about January the 23rd of  
14 1998. What job were you working that day?

15 A Aiken local.

16 Q How long had you been on that job?

17 A Since probably the middle of '91, right close to  
18 '92, '91.

19 Q Who was on your crew on January 23rd?

20 A Engineer Bruce McFarland, J. B. McFarland, and  
21 brakeman/trainman was Chris Shaw.

22 Q What was the weather like?

23 A It was about 45 degrees and raining, 50 degrees and  
24 raining.

25 Q What time did you all go on duty?

1 A At 7:00 o'clock a.m.

2 Q Where?

3 A At the Aiken depot.

4 Q Can you tell us when you first got to work that  
5 morning what you did?

6 A My normal duties are to get the paperwork together,  
7 the train orders, what we need to actually get out -- we can't  
8 get the engine out on the track without, you know, permission  
9 from the dispatchers and all. And then, I gather up all the  
10 paperwork from what industries need switching, you know, who  
11 needs what that day. I'm in charge of what cars to take  
12 where, I get all that from the agent. And then, we have our  
13 little talk about what we are going to do and what sequence we  
14 are going to do it, and then we gather our supplies that we  
15 need that day and then we go to work.

16 Q And did you do all of that that morning?

17 A Yes, sir.

18 Q What was your first stop that morning?

19 A At W. R. Grace plant.

20 Q Do you recall how many empty cars were you bringing  
21 to W. R. Grace?

22 A Approximately seven or eight.

23 Q And do you recall how many loaded cars were you  
24 picking up from W. R. Grace?

25 A I think three, three loads.

1 Q What was the condition of the loaded cars, as far as  
2 clay on them?

3 A Just covered in clay, just all over.

4 Q How much? Tell us what you mean when you say it's  
5 covered in clay.

6 A Well, on the top it might be six or eight inches, on  
7 the grab irons and the platforms where we stand and stuff, it  
8 might be an inch, inch -- you know, on the little grab irons,  
9 that are real thin like this, you know, it won't pile up high,  
10 it will fall off, but it will get up like that. But then on  
11 the inside of the car where there is a base for it to pile up,  
12 it would pile up a foot high.

13 Q Was this unusual to have this much clay on the cars?

14 A It was -- that was a bad time, but it was like that  
15 all the time.

16 Q How long had it been going on like that?

17 A Ever since I had been there in '91.

18 Q Can you tell us a little bit -- you were the  
19 conductor on the job, weren't you?

20 A Yes, sir.

21 Q Aren't you responsible for the job?

22 A Yes, sir, I am.

23 Q Well, did you consider this clay on the cars to be a  
24 safety hazard?

25 A Yes, sir, I did.

1 Q What had you done to get rid of this safety hazard?

2 A Over the years, I had complained hundreds of times  
3 to every officer that I could find, whether it would be the  
4 superintendent, the trainmaster, the track people that work on  
5 the track. I went in the plant and complained to all the  
6 different managers. I talked to David Wood many times and  
7 tried my best not to switch the place. I got into fights with  
8 the trainmaster on several occasions, Mr. Mass.

9 Q What do you mean? Tell us what you are talking  
10 about, got in a fight with a trainmaster over it.

11 A We came back from Aiken -- he would never come to  
12 the plant, none of the trainmasters like to come to the plant.  
13 They would always catch you when you got back to the depot,  
14 and then we would complain that, you really need to go to the  
15 plant. Well, this particular day, we came back, rolling into  
16 Aiken with the cars behind us, and they are just covered. And  
17 when you stop, the clay just blows, you know, and it got all  
18 over the -- all of our personal cars sitting there, Lee Gene's  
19 Mark VIII, you know. It -- so I went in and Trainmaster Mass  
20 just happened to be there, and we all get in there, and we are  
21 gathering up our paperwork to go switch the other industries  
22 that day. And I was telling Mr. Mass, I said, Mr. Mass, you  
23 need to look at these cars; I said, this is just the same old  
24 stuff, it's just covered. And he kicks back, you know, and  
25 he's trying to act cocky. And he says, I have seen the cars

1       -- just go on and get your work done, Lester. So I decided I  
2 was going to get cocky back. And I said, well, I am not going  
3 in the plant anymore, Mr. Mass. I said, I have asked you and  
4 asked you and asked you. I said, I am not going in the plant  
5 anymore. He gets up, turns beet red in his face, embarrasses  
6 me in front of the crew and gets right in my face, and he  
7 says, don't tell me what you won't do, he says, I will fire  
8 you right now. And I shut up, I got embarrassed and walked  
9 off, my engineer walked off with me.

10      Q     Let's go back to the day you got hurt. You said the  
11 cars were covered in clay?

12      A     Yes, sir.

13      Q     When you first got the cars, you said it was raining  
14 that day when you first got the cars. Were all of them  
15 covered with wet clay, or were some of them still dry?

16      A     Some of them are dry -- they have a -- if you have  
17 seen the pictures of the plant, the back end of the plant is  
18 empty -- I mean, you know, no covering, and the front where  
19 you put the empties in, but in the middle where they load  
20 them, it's still -- there's a cover, so it keeps their  
21 employees dry. And most of the time, the loads will be under  
22 that, and then sometimes they will be rolled on down. And  
23 then they roll them down -- they may not roll every load down,  
24 they may want to load a certain car, because they don't want  
25 to clean a car out that's like dirty, so they may roll a

1 couple of empties back, if you know what I mean, to get to a  
2 certain car. So all the -- but they would be wet -- the  
3 answer would be they would be wet or dry.

4 Q Do you recall that morning, the 23rd, did you have  
5 to get on the cars while they were still there at Grace?

6 A No, sir.

7 Q Just able to couple up to them and pull them?

8 A Right. They were hooked to a big cut. And the way  
9 I switched the place, I just sat them out on my empties and  
10 put the cars -- the cars that were already there back in. And  
11 then I coupled up and put our empties in and we left. I never  
12 had to get on the car -- you try to stay off of the loaded  
13 cars as much as you can. I mean, you try to avoid it.

14 Q After you got the loaded cars did you continue on  
15 with your work that day?

16 A Yes, sir.

17 Q Tell us where you went.

18 A Well, we went back to Aiken depot, and then we got  
19 our orders, and we went on out toward Florida Steel and Huber  
20 Clay.

21 Q Let us look at this diagram while you are telling us  
22 about it real quick.

23 A Right.

24 Q So, what you are saying is --

25 A We came off of this little AB line where W. R. Grace

1       is, back to the depot, and then we went up to the top, we went  
2       up here to the --

3           Q     So you came up here?

4           A     Right. Went out that way, and went on out and  
5       switched those places, we go to Oakwood. And see we are  
6       pulling the cars behind us, so when we get to Oakwood, it's a  
7       little run around track, and we take the engine and put it on  
8       the other side, and then we start working our way back. And  
9       we work some of the places going out, and then some of the  
10      places coming back, it's according to which way your switch  
11      opens. And then we come back to Aiken depot, and we get our  
12      orders about how to line the cars up, because at this time, we  
13      have got like 20 cars and they are going everywhere, they are  
14      going to Charlotte, they are going to Lynwood, Columbia, they  
15      are going up in Indiana, or they are going south to like  
16      Augusta or Nixon or -- and I don't ever know where they go.  
17      So the agent will fax a list and he will give it to me. And  
18      then I go down there and I have to that -- back on the main  
19      line, and you have to get -- you go down the hill -- down that  
20      hill --

21           Q     So you take all these cars down here to --

22           A     And right there, you have to get permission to get  
23      out on that big main line, that's were all the big long trains  
24      run, and we are just a little switch engine car -- you know,  
25      gathering up the stuff, and then we put it in that side track

1 at Warrenville, and those big trains come through at night and  
2 pick all the cars up and then they will drop off cars that I  
3 need for my work, so --

4 Q And at this little side track here at Warrenville,  
5 do you all try -- how many groups of cars do you leave there?

6 A Two groups. We switch them up to what goes north.  
7 and we switch them up to what goes south.

8 Q About what time did you all arrive at Warrenville  
9 that day?

10 A Probably about 1:00 o'clock, 1:15.

11 Q Still raining?

12 A Yes, sir.

13 Q How hard was the rain that day?

14 A Off and on, it would get a little bit, and -- mostly  
15 misty, you know, just a steady little misty.

16 Q Tell us what happened when you got to Warrenville.

17 A We got to Warrenville, and I dismounted like halfway  
18 the length of the track. I got off the engine. I dismounted  
19 the engine, and -- so I would be in place when we pulled down  
20 to start making a cut, if you know what I mean. We have to  
21 hold so many of the cars and put them in first, and then we  
22 will reach back out with the engine and get other cars and put  
23 them in -- to put them in the right order.

24 Q I am going to stop you. You have explained -- and I  
25 know it gets complicated, but when you got ready to switch

1       those cars, basically what you are going to do, is you're  
2       going to get your locomotive engine and then start going in  
3       one track, out, in the next one, out?

4       A      Yes, sir.

5       Q      And putting the cars in whichever track it belongs  
6       in?

7       A      Right. So I got down to where the rear of the train  
8       would have come to a stop, because you can't cut the cars off  
9       without brakes on them. So when he stopped, I got up -- I  
10      mounted the two rear cars and put the brakes on, because we  
11      were leaving them on the track.

12      Q      What type of cars did you get on?

13      A      The hopper cars.

14      Q      From where?

15      A      From W. R. Grace.

16      Q      Were they wet by this time?

17      A      Yes, sir, slick.

18      Q      Were they still coated with the --

19      A      Yes, sir, slippery, coated.

20      Q      Tell us what it was like. When you went up on them  
21      the first time tell us what it's like to try to walk on those  
22      cars and move around those cars when they are covered with the  
23      kaolin?

24      A      It's just slick, you just be as very careful as you  
25      can and try to find -- you go one foot at a time and try to

1 find a corner to put your foot in, so it won't slide, you  
2 know, and then you get up in your little stance so that you  
3 can -- and try to make sure that you keep a good handhold,  
4 because if you lose your handhold, you are going -- you know.

5 Q Were you able to safely put the brakes on the two  
6 cars?

7 A Yes, sir.

8 Q And then did you all go and do the switching work we  
9 were talking about?

10 A Yes, sir, that's correct.

11 Q Later on, did you have to go back and take brakes  
12 off those cars?

13 A Yes, sir.

14 Q And is that when you got hurt?

15 A Yes, sir.

16 Q Let me show you -- I am going to show you Exhibits  
17 numbers 27, 26 -- 25, 26, and 27.

18 A All right, sir.

19 Q You have seen these photographs, haven't you?

20 A Yes, sir.

21 Q And this isn't the car you got hurt on, but is it  
22 identical?

23 A Yes, sir. That's a clean hopper car.

24 MR. WETTERMARK: I'll offer Exhibits 25, 26, and  
25 27.

1 MR. GARLAND: No objection.

2 THE COURT: They're admitted.

3 Q Mr. Wettermark: Exhibit 27, that simply shows  
4 what these cars look like from the side; is that correct?

5 A Yes, sir, that's correct.

6 Q And then this is -- Exhibit Number 26; is that a  
7 picture of the brake end of the car?

8 A Yes, sir, that's called the brake end, the "B" end  
9 of the car.

10 Q And let me just show you 25, likewise, is that  
11 another picture of the "B" end, the brake end?

12 A That's right, yes, sir.

13 Q Let me ask you to come down here --

14 MR. WETTERMARK: If he may, Your Honor?

15 THE COURT: Yes, sir, you may.

16 Q Mr. Wettermark: Can you show us how you got on  
17 the car and then tell us what happened?

18 A How you mount a railroad car is, you go to the side  
19 here, there is a step, and you come up the step here, you  
20 know, these are the hand holds, the grab irons, and you work  
21 your way up to this position on a short ladder. This is what  
22 you call a short brake, the high brake would be here. You get  
23 here, my feet -- your feet are here, and your hands are here,  
24 and then you come around, you cross over to this, and then you  
25 cross up to here.

1 Q So at one point in time you are actually kind of on  
2 the corner of the car as you are going around?

3 A Yes, sir, that's real slippery on those -- because  
4 you are twisting and -- you know, you are trying to go from  
5 here to here, and from here around to here without slipping in  
6 the clay.

7 Q Is that hard?

8 A Yes, sir.

9 Q Did you make it around the corner of the car?

10 A Yes, sir.

11 Q What did you do next?

12 A I got up here trying to get the brake off -- you put  
13 the brake on, I had put it on turning it clockwise, and so you  
14 get it off reversing. Like, I got up here and got in my  
15 position, you have to have one foot here and one foot on the  
16 platform and then you have your left hand here, and then you  
17 can take the -- they have that quick release, and you can pull  
18 the quick release, some of the quick releases are push type,  
19 you can push or pull and it pops that brake loose. Usually  
20 you just get up there and pull the quick release and it's off,  
21 and you come around and come back down, you are on the car  
22 three seconds. A lot of times it won't come off.

23 Q And on this afternoon did it come off right away?

24 A No, sir.

25 Q Is that unusual for it not to come off?

1 A No, sir.

2 Q So what did you do then?

3 A Usually, the clay and stuff gets up in there and  
4 gums it up, and so you can wiggle it and play with it, and try  
5 to get it loosened. You can turn it with your hand, you try  
6 the quick release a couple of times, if it won't let the chain  
7 down, which releases the brake, then you can try to turn the  
8 wheel. So I tried to pull the wheel off, and I couldn't move  
9 it. So then I tried to pull it back on, you know, wiggle it,  
10 try to put some more on it, and I couldn't move it that way,  
11 either, it was just stuck.

12 Q You were trying to -- you thought if you could move  
13 it back and forth that would get it free?

14 A Right. And break whatever was gummed up in there  
15 loose.

16 Q Is that something you have done before?

17 A Yes, sir.

18 Q Tell us what happened.

19 A I couldn't get it either way. I couldn't move it,  
20 it was just like stuck. And so I pulled the quick release  
21 again, you know, couldn't get it to do anything, so I grabbed  
22 the brake wheel, and I was pulling it toward me again, to see  
23 if I could manually pull it off, and when I did I slipped off  
24 the car. I mean, just like that, I mean, my hand -- my foot  
25 went that way, my hand went this way, and the next thing you

1 know I was laying on my back in the rocks.

2 Q Do you know what came loose first, your hand or your  
3 foot?

4 A Not exactly. I think my foot shot out, and when it  
5 did, you know, my hand was coming down like this, and then  
6 this hand came loose, it was like instantly.

7 Q Go back to your chair.

8 (Witness complies.)

9 Q Were you wearing anything on your hands?

10 A Yes, sir, my work gloves.

11 Q What type of work gloves do you use?

12 A The Wells-Lamont work gloves.

13 Q Do you wear work boots?

14 A Yes, sir.

15 Q What type of work boots do you wear?

16 A Wolverine, mostly Wolverine steel toe, regular good  
17 work boots.

18 Q How long had you had this pair of boots?

19 A About a month.

20 Q When you fell off the car what part of your body hit  
21 the ground first?

22 A My buttocks and lower back and my hand, I was  
23 falling back and trying to put my hand down and catch myself,  
24 like reflex, and kind of landed on the tailbone area.

25 Q And you said which hand?

1 A This right hand.

2 Q What was your -- when you -- what was your initial  
3 reaction when you hit the ground?

4 A Fear. You know, I haven't fallen like that, and it  
5 was like a shock. You know, I hit the ground. I didn't stay  
6 there long, and I popped back up. And I'm like, I'm all  
7 right, I'm okay. You know, I was assessing, looking around,  
8 it's like, you know, it scared me to death.

9 Q Prior to this day on the cars with the kaolin on  
10 them have you slipped on them before?

11 A Yes, sir.

12 Q Have you ever fallen, I mean, where you have  
13 actually lost your footing or handhold?

14 A I have lost it and caught myself, you know, a bunch  
15 of us have, about, you know, maybe catch yourself and bang  
16 your elbow or bruise your knee, or bruise your -- but I had  
17 never fallen like that and lost it completely.

18 Q Where did you -- what did you do, where did you go?

19 A I got up, and -- I think Chris called me and asked  
20 me was I in the clear, because I was on the off side from  
21 him. And I told him yes, and -- so I walked on over toward  
22 the north end, he was pulling that and shoving that in the  
23 south end, and I kind of walked over here to where the cars  
24 are on the north end.

25 Q When you fell how far were you from the rest of your

1 crew?

2 A The engineer was probably 15 -- no, he was further  
3 than that, he was probably 25 car lengths, which is a 50-foot  
4 car usually. He was a pretty good ways up the track.

5 Q Twelve hun -- quarter of a mile?

6 A And then the brakeman would have been at the --  
7 Chris would have been around there at the coupling, which  
8 would have been six car lengths, because we had three tanks,  
9 and I think like three hoppers, which is like 300 feet, but he  
10 was -- and he was on the other side.

11 Q Did you -- eventually they come to you with the  
12 engine?

13 A Yes, sir, that's correct.

14 Q When you got back with your crew did you tell them  
15 what had happened?

16 A I told Chris on the ground, when we were making our  
17 brake test to go to Aiken, I told Chris, and then we got up on  
18 the engine, and I told Bruce, the engineer.

19 Q Tell us, when you got on the engine, did you -- what  
20 did you do with your crew as far as checking you out?

21 A I was still scared and I didn't know how bad I was  
22 hurt. I was looking at my hand, it was swelling up. And  
23 Chris was going, I think you broke your thumb. And I was  
24 saying, how bad is my back. And he was pulling up my shirt,  
25 and he said, you know, you need to -- we got -- you hurt

1 yourself bad, or whatever. So then we went to the -- when we  
2 rode up to Aiken depot.

3 Q How did you feel at that point in time?

4 A It was starting to hurt worse. You know, the back  
5 was, you know, a lot of pain in the back, my hand was swelling  
6 up and bruising up, and everything. I couldn't see my back,  
7 but they said it was bruising up, too. But my hand hurt  
8 pretty bad and I was getting a headache. I couldn't bend  
9 over, I was tightening up bad.

10 Q When you got to the Aiken depot did you keep on  
11 working, or did you get off?

12 A I got off.

13 Q What did your crew do?

14 A They went on up and finished the work, put the cars  
15 away. Chris did that for me while I called the supervisors  
16 and reported it. They put the cars away, and then came back  
17 and put the engine away, and that was the end of our day.

18 Q Which supervisor were you able to get in touch with?

19 A Superintendent of terminals, Mr. Roberson, in  
20 Columbia.

21 Q What instructions did he give you?

22 A He told me to stay right there, and he would call me  
23 back in five or ten minutes.

24 Q And did he call you back?

25 A Yes, sir.

1 Q And what instructions did he give you then?

2 A He said they were on the way, and for me to instruct  
3 the train crew for nobody to leave, nobody to change clothes  
4 or anything for -- the other crew couldn't go home. I told  
5 them I was sorry, you know, that they couldn't go home, and  
6 that we had to wait until they got there. He said, stay right  
7 there until we get there.

8 Q What time was this?

9 A About 2:00 o'clock then.

10 Q How long before the officials got there?

11 A The first one got there at a quarter to 5:00, 2  
12 hours and 45 minutes.

13 Q So you all stayed there the whole time?

14 A Yes, sir.

15 Q How was your back and hand doing?

16 A Getting worse, hurting bad.

17 Q Who were the first officials to arrive?

18 A Trainmaster Chapman arrived first.

19 Q Who came next?

20 A Superintendent of Terminals, Mr. Roberson, and a  
21 road foreman, Mr. Marcum, he's like over the engineers.

22 Q Who came next?

23 A Then came Assistant Superintendent, Mr. Burgess, out  
24 of Greenville, he is way up the ladder; and then division road  
25 foreman, I didn't ever get his name. There were five of them

1           that came.

2           Q     Tell us what happened when they got there.

3           A     Mr. Chapman got there first, and he came in and kind  
4         of ignored me first, you know, went over there and started  
5         getting the bulletin books updated and everything, and just  
6         kind of non -- you know, asking me what happened and going  
7         over little stuff like that. And I told him I was hurting  
8         pretty bad, and this took -- went on for like 10 or 15  
9         minutes, and Mr. Roberson walked in the door.

10          Q     Did they -- was there a discussion about medical  
11         attention for you?

12          A     Yes, sir. All during the four or five hours that  
13         they kept me there, you know, there was a lot of talk about,  
14         you know, would you -- will you work with you us, you know --  
15         there was --

16          Q     The officials got there at what, 4:45, 5:00 o'clock?

17          A     4:45.

18          Q     What time did you finally get home?

19          A     I didn't get home until probably at least 7:30. I  
20         mean, it might have been -- probably 7:30, 8:00 o'clock.

21          Q     So tell us what -- I mean, did you ask to go to a  
22         doctor, did they offer to take you to the doctor? What  
23         happened in that regard?

24          A     I told them I was hurt bad. And Chris -- everybody  
25         was telling them I was hurt pretty bad. And they were just

1 putting the pressure on about, will you work with us and keep  
2 this a non-reportable, will you try to hang in there. And  
3 there was things, you know, like they were putting ice on it,  
4 They went and got ice and put on it. And they said they knew  
5 what to do. Mr. Burgess got there, and he said, I know what  
6 to do, trust me. And they went and got ice bags and put on my  
7 back, had me sit in a chair. They put ice packs on top of my  
8 hand and gave me Tylenol.

9 Q I mean, were you willing to, as they say, try to  
10 work with them, try to keep this from being reportable?

11 A Yes, sir. I was trying, I was trying.

12 Q Did you tell them how you got hurt?

13 A Yes, sir.

14 Q Did you actually fill out an accident report?

15 A Yes, sir. I couldn't write very much, but --

16 Q Are you required to fill out one of these things?

17 A Yes, sir.

18 Q Let me show you what has been identified as  
19 Plaintiff's Exhibit Number 28. Is this the accident report  
20 that you filled out that evening?

21 A Yes, sir. That's right.

22 MR. WETTERMARK: We'll offer Exhibit 28.

23 MR. GARLAND: No objections.

24 THE COURT: That's admitted.

25 Q Mr. Wettermark: Would you read for us what the

1 description is that was written here?

2 A It says, "while releasing hand brake on covered  
3 hopper, loaded with clay, slipped on clay on hopper and fell  
4 to ground."

5 MR. WETTERMARK: May I submit this to the jury?

6 THE COURT: Yes, sir. You may.

7 Q Mr. Wettermark: Did you tell them about the clay  
8 on the cars?

9 A Yes, sir, I did.

10 Q Was there a discussion about that?

11 A Yes, sir, there was.

12 Q Tell me what the discussion was about the clay on  
13 the cars.

14 A Can I talk about -- can I talk about when -- you  
15 want me to go as far as when we were down at the car and they  
16 actually got to see the cars?

17 Q Well, you actually -- that sounds good. Did you and  
18 the officials actually go back down to Warrenville to see the  
19 car that night?

20 A Yes, sir. At 6:20, after they had interviewed  
21 everybody and took them all outside and asked them what  
22 happened, and did all this stuff, then they let the crew go at  
23 6:20. And then they took me to Warrenville in the company car  
24 to show them where I fell and show them the car.

25 Q Who went to Warrenville with you?

1           A     Mr. Burgess, Mr. Chapman. And I don't know if Mr.  
2     Roberson or Mr. Marcum went, they might have stayed up there  
3     at the depot. I don't remember seeing them down there at  
4     Warrenville.

5           Q     Tell us what happened. Did you go show them the  
6     car?

7           A     Yes, sir. I went and showed them the place I fell,  
8     I showed them the car.

9           Q     Was the car still covered with clay?

10          A     Yes, sir. Had clay on the car.

11          Q     What response did you get from the officials?

12          A     Mr. Burgess asked Mr. Chapman why is the clay -- why  
13     does the clay have to be on these cars? And Mr. Chapman said  
14     something like, you know, I really don't know why it has to be  
15     on cars. And he instructed Mr. Chapman to be with me -- he  
16     asked me, well, when do you work this plant again. And I  
17     said, first thing on Monday, we are off on Saturday and  
18     Sunday. And he said, well -- do you -- will you try to hang  
19     in there over the weekend. And he says, I'm going to have Mr.  
20     Chapman meet you at 7:00 o'clock Monday, and go out there and  
21     get this problem fixed. And I said, yes, sir, I will try.

22          Q     There was something you told me about. Did you all  
23     see some paw prints, animal prints out there?

24          A     There had been a cat -- it had stopped raining, and  
25     there was a bunch of people down there, shop people and all,

1 and there had been a cat that had got up on the clay car, and  
2 he got this clay on his feet, and then he had jumped down off  
3 the clay car, and he was walking the track, the rail, and he  
4 was making little clay foot prints. And Mr. Burgess saw that  
5 and laughed, and he said, well, that cat won't last very long  
6 walking that track -- walking that main line. So he thought  
7 it was funny.

8 Q At any point when you were there with the officials,  
9 did they inspect your gloves?

10 A Yes, sir. I think they looked at my gloves.

11 Q Check out your boots?

12 A Yes, sir. They looked at my boots, my clothes.

13 Q Did anybody take any exception to any of your  
14 equipment?

15 A No, sir.

16 Q Who took you home that night?

17 A One of the officers. I think Mr. Chapman or Mr.  
18 Burgess, or whatever, took me home. Well, I didn't live but  
19 like three or four miles from the depot at that time, well, I  
20 didn't live there, but that's where I stayed at night.

21 Q You just can't remember which one for sure?

22 A No, sir.

23 Q When you got home that night what was your  
24 condition?

25 A It was stiff and hurting pretty bad. And I got ice

1 and put on it and sat on it and everything. And then I called  
2 the agent, Jimmy King, he lived pretty close by, and got him  
3 to go get me something to eat, because I hadn't had anything  
4 to eat.

5 Q Did you sleep any that night?

6 A No, sir. Not much.

7 Q How about Saturday; how did you do on Saturday?

8 A I kept icing it up and taking Ibuprofen and Aleve,  
9 and it was starting to feel a little bit better. I was --  
10 kept it numb and iced up and everything, and I was feeling,  
11 you know, a little bit better.

12 Q How about Sunday?

13 A Just progressing a little bit better. I said, you  
14 know, I think I am going to be okay. I said -- you know, I  
15 said, it's easing off and I am keeping it iced up, and I just  
16 rested and didn't do much of anything. And I was, you know,  
17 ready to go Monday. I mean, I was sore, I was hurting pretty  
18 good, and it was bruising up and everything, it looked pretty  
19 bad but I thought it would go down.

20 Q Well, come Monday morning, did you feel up to trying  
21 to work?

22 A Yes, sir.

23 Q And did you go to work that morning?

24 A Yes, sir.

25 Q That would have been Monday the 26th?

1           A     That's right.

2           Q     Well, when you got to work at the Aiken depot that  
3 morning tell us what happened.

4           A     I got there at 7:00 o'clock, and we got our  
5 paperwork and everything, and Mr. Chapman wasn't there yet.  
6 And so we did our usual thing, I got my paperwork, my switch  
7 list and everything from the -- called Jimmy King in Augusta.  
8 We got our supplies and everything and --

9           Q     You said that Mr. Chapman wasn't there yet, you were  
10 expecting him based on the conversation --

11          A     I was thinking -- I told Chris. And Chris asked me,  
12 said, well, are we going to wait on Mr. Chapman. And I said,  
13 well, let's go out here to the rock track since it's right  
14 there right at the depot and go ahead and get our cars that we  
15 are going to take for the W. R. Grace plant, because that's  
16 our first move anyway. I didn't want to be just sitting there  
17 doing nothing, so I said, let's go ahead and get our empties  
18 together. So we got out there and was getting our empties,  
19 and he called on the radio and said, where are you at. And I  
20 said, we are getting ready to leave Aiken to go to the plant,  
21 the Grace plant. And he said, well, I will just meet you at  
22 the W. R. Grace plant. He was running a few minutes late, I  
23 reckon.

24          Q     So you all started heading to the Grace plant?

25          A     Yes, sir. We started out toward the W. R. Grace

1 plant with our engine and four empties.

2 Q Then what happened?

3 A It's about four miles out there, and so we started  
4 out there, and we started developing engine trouble, the  
5 engine wouldn't move. We call it loading up, or you could  
6 give it throttle. And the engineer, it wasn't loading up.  
7 And we were just coasting. It's downhill to the plant, but  
8 it's uphill back. So we are just kind of coasting, he can't  
9 get it to move, and he says, we have lost power. So I got on  
10 the radio and called the big dispatcher in Greenville, told  
11 him he needed to get the Augusta shop truck to come to us that  
12 our engine was quitting, we couldn't move. And we coasted  
13 down to this crossing. I told Engineer -- Tommy Connolly was  
14 our engineer Monday, I said you better stop the train short of  
15 that crossing there, that's a big bypass, so we don't block  
16 cars. So we stopped.

17 Q And then what happened?

18 A Then Trainmaster Chapman heard me calling for the  
19 help, you know, for the engine, so he called and said, where  
20 are you at. And I said, we are stopping at this big 118  
21 bypass. And he said, okay, I will come around there to you.

22 Q And did he?

23 A Yes, sir. He did.

24 Q And when he got there did you all have a  
25 conversation about going to W. R. Grace?

1           A     Yes, sir, we did. He got up on the engine. I said  
2           -- talked a few minutes. And I said, the shop truck might be  
3           an hour or two, why don't you and I just run around there in  
4           your car and I will show you the problem.

5           Q     And did he agree to?

6           A     Yes, sir. He did.

7           Q     So did you all go to W. R. Grace?

8           A     We hopped in his car and we went around to W. R.  
9           Grace, and he pulls in there and pulls down to the top end,  
10          where you put the empties in, and there are no cars there.  
11          And he gets out, looks around, there is some clay piled up and  
12          everything. And one of the guys, Mark comes out, and I  
13          introduce him to Mr. Chapman and they talked a few minutes.  
14          And he said something about the clay on the ground to this  
15          Mark guy. And Mark said, yes, we will get the -- we got a  
16          little backhoe type thing that we will pick that up with. And  
17          he asks me, he says, where's the train. And I said, it's  
18          broke down around the curve about a mile, I said we will be  
19          here as quick as we can. And then Mark went back in the  
20          building. So I looked at Mr. Chapman, and I said, Mr.  
21          Chapman, the problem is down in the plant where the loads are.

22          I said, let's you and I walk down in there and I will show  
23          you where the problem is. He said, I have seen enough, let's  
24          go back to the train. We got back in the car, went back to  
25          the train.

1 Q Did you all get your train fixed?

2 A Yes, sir, about -- probably took a couple of hours,  
3 and shop truck got there and fixed the engine.

4 Q When Mr. Chapman -- when you finally had him down  
5 there at the plant, and you said, let's go down and see where  
6 the problem is, and he said, I have seen enough, I mean, was  
7 that anything new?

8 A No, sir.

9 Q When you got your engine fixed did you all go ahead  
10 to W. R. Grace?

11 A Yes, sir. We went down to the plant and got ready  
12 to start switching. We put our empties out on the main line  
13 like I always do, and then we started in with the engine. And  
14 when we started coupling these loads -- there were seven loads  
15 to come out, and they were just covered. I mean, they -- it  
16 was just bad, covered. And I stopped Chris, I said, hold up,  
17 hold up, I said. I told Tommy -- I said, just stop, Tommy. I  
18 said, take your break, Tommy. I said, Tommy, call Trainmaster  
19 Chapman on the radio and tell him to come back around here.  
20 Well, he called two or three times and he couldn't get him.  
21 He had gone to the depot, and I guess he was in the depot  
22 making phone calls. So I went in there and called on the  
23 phone and got the dispatcher to call him on the phone at Aiken  
24 depot and told him to come back around to Grace, that we had a  
25 problem.

1 Q And did he come?

2 A Yes, sir. He did.

3 Q Tell us what happened when he got there the second  
4 time.

5 A He got there the second time about 20 minutes later,  
6 and we -- all this time, the engine had been sitting there for  
7 30 or 40 minutes, so he drives up in a car -- now, he drives  
8 to the lower end this time, he drives down there to where the  
9 cars are, because he sees us standing there, me -- myself and  
10 my brakeman, Chris Sharpe. And about this time, David Wood,  
11 the plant manager comes out because we have got his plant tied  
12 up because we are not switching. He comes out and says, what  
13 is going on. He gets out of the car. And I said, Mr. Chapman  
14 and take a pic -- I said, come around here and let me show you  
15 this problem and take a picture for Mr. Burgess. He said,  
16 something -- either said, I don't have a camera, or he said, I  
17 am not getting the camera right now. He says, let -- he says,  
18 show me what you have got. So I introduced him to Mr. Wood.  
19 They walked all around the cars, it was just covered, Chris  
20 and I were with them. Mr. Wood said, plant manager at Grace  
21 said, I hadn't seen it quite this bad lately. I said, Mr.  
22 Wood, it's like this every day, it's like this every other  
23 day. You will blow it off, you try to blow it off and then  
24 you will pile it right back up. So then Mr. Chapman told Mr.  
25 Wood, he said, you know, you need to try to make an effort to

1 blow a couple of the grab irons off and a steel step where  
2 they can get -- at least get up on the car. Chris looked at  
3 Mr. Chapman, he said, what about all this clay piled up in  
4 there that's a foot deep. He says, it's blows right off --  
5 right on us, gets in our faces and everything, and then it  
6 covers the grab irons again. So Mr. Wood says, well, you  
7 know, I will look into it. So he walks off, goes back into  
8 the plant. You want me to continue?

9 Q Yes, sir.

10 A Then I look at Mr. Chapman, and I said, well, what  
11 do I do now, Mr. Chapman, I says, here's the cars, here's the  
12 problem, I said, it's covered in clay. I said, best thing we  
13 can do is just leave the cars sitting right here until they  
14 clean them up. He said, this is a good customer, you are  
15 going to switch this place. I said, you want me to switch  
16 this place. He said, yes, you have got to switch them, got in  
17 his car drove off. Me and Chris sat there going, what can you  
18 do, I mean, what could I do.

19 Q Did you switch them?

20 A Yes, sir.

21 Q Get them out of there okay?

22 A Yes, sir.

23 Q Where did you take them?

24 A Went back to Aiken depot with them.

25 Q And what did you do when you got to Aiken depot?

1           A     We were getting ready to take them down to  
2 Warrenville, so we had to get our engine around them, so we  
3 have to get down and tie some brakes. So Chris got down, I  
4 got down, and then we got up and started mounting the cars.  
5 And Chris got the first brake and I walked back there and got  
6 the second brake, about that time Chris was coming back. I  
7 mounted the car, got up on the platform, and was putting the  
8 brake on and slipped again. My foot -- my right foot slipped  
9 on that clay and pulled down and I almost fell off the car,  
10 but I didn't. I grabbed myself and I was about to cry. And  
11 Chris come walking up, and I said, Chris, I hurt myself bad, I  
12 said, something ain't right. I said, something in my back is  
13 not right. And I eased around, and he helped me down off the  
14 car. And I told him, I said, get Tommy Connolly off the  
15 engine and come on in the depot, and we will call Mr. Chapman  
16 again.

17           Q     And did you all call him again?

18           A     Yes, sir.

19           Q     Did he come?

20           A     Yes, sir.

21           Q     And tell us what happened when he got there.

22           A     He walks in the depot and Tommy and Chris and I are  
23 standing there, and he says, what now.

24           A     And I said, Mr. Chapman, I have hurt myself on this  
25 second load out here. I said these cars are covered with

1 clay. I said -- you know, and I have re-injured myself. He  
2 said, this is a bunch of crap. And I said, I'm going -- you  
3 know, do I need to fill out another form, or something. He  
4 says, no, no. I said, Mr. Chapman, I have hurt myself bad. I  
5 said, I don't know how much I can go. So he says, well, I  
6 will get a relief crew to come relieve you all, he said, how  
7 about that, and let you go home and get some rest this  
8 afternoon. He says, how about you and Chris take the cars  
9 down to Warrenville and set them off, and I will get a relief  
10 crew to come down there and meet you all, and relieve us for  
11 that day, and finish the work.

12 Q What did you say when he asked you to take -- I  
13 mean, these are the cars you had just finished falling on  
14 again?

15 A I said, Mr. Chapman, the cars are covered with clay.  
16 I said, the engine out there, the walkway is covered with  
17 clay. I said, we are going to slip and slide on that, you  
18 want Tommy to get up there and fall. I said, if I take these  
19 seven cars to Warrenville and set them off, Leon or some of  
20 these other people is going to come through at night with this  
21 clay on them and they are going to have to get up on these  
22 cars and knock these brakes off, and I said, they are going to  
23 slip and fall. He said, you let me worry about that. You  
24 take the cars to Warrenville.

25 Q What was your reaction to that?

1           A     I got mad. He said he had a crossing accident at  
2       the W line on another main line and he left, for like the  
3       third or fourth time that day. And I got mad. I said, I am  
4       going over his head. I said, this is --

5           Q     Did you try to go over his head?

6           A     Yes, sir.

7           Q     Who did you call?

8           A     I picked up the phone and called up to Mr. Wagner,  
9       who is the superintendent in Greenville, and he's over Mr.  
10      Burgess. And I couldn't find him, he was gone. So then I  
11      asked for Assistant Superintendent Burgess, well, they put me  
12      to his secretary, or whatever. And she said that he was up in  
13      Lynwood, North Carolina, in meetings all day. So then I  
14      didn't know what to do, so I said, well, I can't find  
15      anybody. So I called Jimmy King, the agent in Augusta over  
16      there and told him what all happened, and told -- you know, I  
17      can't order a relief crew, because that costs them a lot of  
18      money to send a crew. I had to tell him why we were getting a  
19      crew and whose permission I had to get the crew and  
20      everything.

21           Q     You never could get an official, though?

22           A     Never could get anybody to --

23           Q     So what did you decide to do then?

24           A     I thought for a minute, and thought for a minute,  
25      and then I said, man, I am going to call my wife two blocks up

1           the street working and ask her if she has got a camera, come  
2           down here and take pictures of these cars.

3           Q     And did she come down and take pictures?

4           A     Yes, she did.

5           Q     We have got those pictures here, don't we?

6           A     Yes, sir.

7           Q     Are these the pictures that -- well, they are  
8           blowups, obviously, but are these the pictures that your wife  
9           took that day?

10          A     Yes, sir, they are.

11          Q     Let me get my numbers right, Lester, before we put  
12         them in evidence.

13          A     All right, sir.

14          MR. WETTERMARK:     These are exhibits 14 through  
15           24, photographs of the rail cars taken that day, we will  
16           offer them into evidence.

17          MR. GARLAND:     No objection.

18          THE COURT:     They are admitted.

19          Q     Mr. Wettermark:     Lester, if you would --

20          MR. WETTERMARK:     May I have him come down here, Your  
21         Honor?

22          THE COURT:     Yes, sir, you may. Just be sure to  
23           speak up loudly so the Court Reporter and all the Jurors  
24           can hear you.

25          Q     Mr. Wettermark:     I don't have these in any

1           particular order, so you will have to explain them to me, to  
2           us. Let me show you Exhibit Number 15, show us where the --

3           A     This is just a car, a hopper car, and it's supposed  
4           to be clean, but the commodity -- the stuff is supposed to be  
5           in the car, not on the car, and it gets all over the knuckles,  
6           the couplers --

7           Q     That's all this white stuff?

8           A     All this white stuff, this is clay. All this stuff  
9           in here is clay, all this build up, like six or eight inches.  
10          All this is clay, clay on these grab irons, that's where you  
11          would come across from this side and step, this is where you  
12          would step, covered in clay. This is the type of clay that  
13          was building up on the cars and blowing all over us, and all  
14          in our faces and all over the stuff that we were climbing on.

15          Q     What we are seeing here, this is after you all have  
16          pulled these cars for how far, how many miles?

17          A     Four miles, bouncing and pulling them with the wind  
18          blowing, and that's what is left after four miles.

19          Q     Was it worse than this when you first picked them  
20          up?

21          A     Yes, sir.

22          Q     Exhibit Number 18, again, is that a view of --

23          A     That's a different car, it's just pictures of the  
24          seven cars, and it's all up in here, caked up in there, and it  
25          blows off and it would get all in the walkway -- see all this

1 clay is in the walkways. And this is what you walk across  
2 the car -- like if I had to cross over, you can't just run and  
3 jump over the knuckle, you have to -- I don't mean to use  
4 railroad lingo, but you have to climb up and then cross over,  
5 and you go across this thing to get to the other side of the  
6 car, and it's covered in clay.

7 Q Exhibit 19.

8 A Same type -- this is a -- one photo, top photo of  
9 the car that I got injured on, I believe, and this is all the  
10 clay that's built up. This is the brake that I was putting  
11 on. This is the platform that I was on. That's all the clay  
12 that was on that car.

13 Q You actually -- let me find the two photos. Looking  
14 at Exhibit 18 and Exhibit 19, a kind of cross-referencing; can  
15 you tell if this is the same platform as this?

16 A Yes, sir, that's the same car.

17 Q And this is the car you were hurt on?

18 A Right.

19 Q Can you see in these photographs? Can you see where  
20 your foot slipped?

21 A Yes, sir. I got her to try to get where my feet  
22 were.

23 Q Show us where your -- what you are talking about.

24 A If you can see the clay buildup, and my left foot  
25 was here, my right foot was in here, if you can see that

1       imprint. And then when I slipped, my foot turned out this way  
2       and pushed this clay -- this is gone, the clay, and it's  
3       pushed over to here. And I slipped -- I just slipped out that  
4       way while I was pulling the brake.

5           Q     And you are pointing right here where the clay has  
6       been kind of knocked out of that crevice, that corner there?

7           A     I was trying to apply the brake onto the car.

8           Q     In this other view, is that where you are talking  
9       about, where your boot hit it and knocked the clay --

10          A     Yes, sir. If you can see it good enough, there's  
11       clay all built in here, clay all built in here, and then it's  
12       knocked loose right there, where my toe drug across.

13          Q     Let's just go show all the rest of these  
14       photographs. Again, these are more photos showing the  
15       accumulation of the clay.

16          A     Just different cars, there were seven cars -- I  
17       said, get as many pictures as she could of -- it's just  
18       everywhere, it just -- it piles up everywhere, and they say,  
19       well, we don't see where it can get. And I said, it gets  
20       everywhere.

21          Q     Let me show you Exhibit Number 16. How thick has it  
22       -- how thick would have been your best judgement is this in  
23       here?

24          A     That's probably six to eight inches, maybe ten  
25       inches, you know, that is a flat base, and here is like the

1 bottom. So you can see where the bottom would be, and it's  
2 piled up in there. And when it blows, it blows out and covers  
3 all this other stuff, and if you are riding right in here, and  
4 the wind is blowing across, it just blows all in your face.

5 Q Again, here is a closer up photograph of the  
6 accumulation. Again, how -- well, you can see here how many  
7 inches that is. What is your judgment, how many inches  
8 accumulated?

9 A Probably a foot, 10 to 12 inches, it looks like,  
10 close.

11 Q Exhibit Number 20.

12 A Same thing, that's just like a bleed right where --  
13 where you would bleed air off the car, but this is all taped  
14 up, it's just another view of the clay caked up on the cars.  
15 That's like a -- yes, that's like the draw head, and the  
16 walkway. See the walkway with the clay dripping off of it,  
17 and --

18 Q Hard to see it from there.

19 A Right. It was sun shining on Monday, it was pretty  
20 on Monday.

21 Q Let me show you the next exhibit.

22 A This is the engine, this is our engine. This is our  
23 walkway, this is our engine, and of course, on one end is  
24 where we ride and then the other end is the long one where you  
25 can see us coming down the tracks. So this is our walkway,

1 which is supposed -- it's black, this engine is black, and  
2 this is black. This is clay, this is a light buildup, and  
3 then it gets heavier, and then, here is how heavy it is. And  
4 it's just slick, you go walking down through there, holding  
5 onto the rail. All of that is supposed to be black. See,  
6 that's the white clay on the side of the engine. And I said  
7 -- I said, you want us to work on an engine like that.

8 Q There's one last photograph. Your wife actually  
9 took a photograph of you out there that day. Is that you?

10 A Unfortunately. That's a picture of me.

11 Q What is all this white stuff?

12 A This is the clay. This is clay on my coat, clay  
13 piled up -- you know, stuck on the side of the engine. This  
14 is clay all in my hat, clay all on my safety glasses, all in  
15 my jacket, on my shirt. My wife, every day -- you know, I  
16 would wash this jacket twice a week, it would just be  
17 covered.

18 Q You can go back to your chair, Lester.

19 (Witness complies.)

20 Q Did you fill out an accident report for that second  
21 day?

22 A Yes, sir. Two officials said I didn't need to, but  
23 I filled one out anyway.

24 Q Let me show you Exhibit 29. Is this the accident  
25 report you filled out on January 26th?

1 A Yes, sir. It is.

2 MR. WETTERMARK: We'll offer Exhibit Number 29.

3 MR. GARLAND: Is that the same as number 2?

4 MR. WETTERMARK: Yes.

5 THE COURT: That's admitted.

6 MR. WETTERMARK: May I submit it to the Jury?

7 THE COURT: Yes, sir.

8 Q Mr. Wettermark: When did you go see a doctor the  
9 first time?

10 A Tuesday.

11 Q The next morning?

12 A Tuesday, January 27th.

13 Q And where did you go first?

14 A First, they took me to a company railroad doctor in  
15 Columbia, South Carolina.

16 Q Who went with you to the doctor?

17 A Trainmaster Chapman and Superintendent of Terminals,  
18 Mr. Roberson.

19 Q After you saw the railroad doctor in Columbia did  
20 you go see another doctor?

21 A Yes, sir, I did.

22 Q Who?

23 A I finally got them to let me go see my doctor in  
24 Aiken the next day.

25 Q And did he make a -- did he refer you to two more

1           doctors, instead, two more doctors?

2           A     Yes, sir. He treated me a couple of weeks, and he  
3           referred me to -- finally referred me to two more doctors.

4           Q     What doctors did he refer you to?

5           A     Dr. Hill, orthopedic doctor for my thumb; and Dr.  
6           Eisenberg, a neurologist for my back.

7           Q     If you don't mind, let me take you through your  
8           thumb, and the treatment on your thumb, and then I am going to  
9           go back and talk about your back.

10          A     All right, sir.

11          Q     Before I do that, Lester, let me just ask you this.  
12          Which of your two injuries, your hand, your thumb, or your  
13          back, gives you the most trouble?

14          A     My back.

15          Q     By a small margin or a wide margin.

16          A     No, by a large margin.

17          Q     Let's talk about your thumb first. You went to see  
18          Dr. Hill, what did he do for you?

19          A     He immediately put me in a cast, a hard cast.

20          Q     How long did you stay in the cast?

21          A     Five weeks.

22          Q     And after you got out of the cast what did he put  
23          your arm in?

24          A     He put my hand in -- thumb in like a little splint,  
25          a removal splint, so I could work with it some.

1 Q And then after the splint -- well, how long were you  
2 in the split?

3 A I think two to three weeks.

4 Q And then what sort of treatment did you get for your  
5 hand?

6 A Thumb therapy. I went to Hitchcock Rehabilitation  
7 for hand therapy.

8 Q Did that get you as well as you wanted to be?

9 A No, sir.

10 Q Did you get a referral to yet another specialist?

11 A Yes, sir.

12 Q Who was that?

13 A Dr. Wendell Duncan, in Augusta, Orthopedic.

14 Q Dr. Hill was just a local doctor in Aiken?

15 A Yes, sir, he was a local.

16 Q And then Dr. Duncan, was he a specialist in --

17 A He was like a specialist -- we heard about, you  
18 know, like he operated on ball players and stuff, you know.  
19 He could --

20 Q And you went to see him in Augusta?

21 A Yes, sir.

22 Q And he recommended surgery for you, hadn't he?

23 A Yes, sir.

24 Q Well, tell us why haven't you had the surgery,  
25 what's your thoughts on the surgery?

1           A     Well, he said the only thing he could do was --  
2         would be to fuse it. And if he fused it, then nothing would  
3         move but the little tip end, and this would not move, it would  
4         just be stationary, he said. And then you -- I think he said,  
5         like you cut the nerves so that you don't have pain, but you  
6         don't have the movement. And he said, or I can leave it like  
7         it is, you know, but you have to live with the pain.

8           Q     So what have you chosen?

9           A     I told him, I said, right now, I would like to try  
10         to keep the movement, if I can, and try to deal with the pain.

11          Q     How bad is the pain in your hand?

12          A     It's not too bad if I don't -- you know, if I don't  
13         just grab and squeeze something, or you know, if I don't do  
14         the wrong thing, it's not that bad.

15          Q     Can you look at your hand and see the injury?

16          A     Oh, yes, sir. Yes, sir.

17           MR. WETTERMARK:     May I have him come down and  
18         show the Jury?

19           THE COURT:        Yes, sir.

20          Q     Mr. Wettermark:     Mr. Kirkland, if you would,  
21         come down here. Maybe hold your hands up like this, first.  
22         And this is the thumb, injured thumb, and that's your good  
23         thumb?

24          A     Yes, sir.

25          Q     Now, maybe show them like this, can you do it like

1           that?

2           A     Yes, sir. If I can open it --

3           THE COURT:     Speak up a little bit, please, sir.

4           I want to be sure the Court Reporter --

5           THE WITNESS:    I'm sorry.

6           THE COURT:     That's fine, just speak up a little.

7           A     The Witness:    I can open this one wide, I can't get  
8       this one open, and I can't get it closed. I can get it about  
9       right there. They worked with it and worked with it in  
10      therapy, but I couldn't get it to go anymore. It's got a big  
11      knot on it.

12          Q     Maybe show -- show them like this.

13          A     I don't know if they -- can everybody see it? Can  
14       you see the knot?

15          Q     Has it been like that since the day of the accident?

16          A     Yes, sir, since the day of the accident.

17          Q     You told us that Mr. Sharpe was afraid it was  
18       broken; is that --

19          A     Mr. King said, oh, you broke your thumb.

20          Q     That's fine, Lester, you can go on back to the  
21       witness stand.

22          (Witness complies.)

23          Q     Let's talk about your back. Who was the specialist  
24       you went to for your back?

25          A     Dr. Eisenberg, a neurologist.

1 Q I don't know how to get you -- to take you through  
2 all the treatment you have had with him. How many MRI scans  
3 have you had?

4 A Four MRIs.

5 Q How many EMG scans -- EMG tests have you had?

6 A Two or three on my leg.

7 Q Let me try it this way. When you first started  
8 going to see Dr. Eisenberg in January and February, how did he  
9 start off by treating you? What was his first type of  
10 treatment for you?

11 A First, he started for a month with medication and  
12 rest, just try -- do nothing, he said, don't pick up anything,  
13 don't twist, don't turn, just rest it, and pain medication.

14 Q And how did you do?

15 A It just stayed the same.

16 Q And so then what type of treatment did he go into  
17 after that first month or so?

18 A He went into physical therapy at Hitchcock  
19 Rehabilitation.

20 Q And how often and how long did you go to physical  
21 therapy at Hitchcock?

22 A I went to physical therapy for two months, three  
23 times a week.

24 Q Was there anything in the physical therapy that  
25 seemed to help?

1 A Yes, sir.

2 Q What helped the most?

3 A I don't know what you call it when they hook you up  
4 to your hips and your shoulders and they stretch your body  
5 apart?

6 Q Traction.

7 A Traction. And when they let you go back, and I  
8 would lay there for a minute, and it would start hurting. And  
9 they would pull me, and I would tell the therapist, I would  
10 say, keep me pulled apart, because it's not hurting when I am  
11 pulled apart. But it would -- they hook you to a machine and  
12 it does it a minute and then a minute and then a minute and  
13 then a minute. And ice -- and they ice you up, they lay you  
14 down and they massage it with ice, and that numbed it up and  
15 helped it.

16 Q But overall, what was the overall results of the two  
17 months of therapy?

18 A It just stayed the same, it wasn't -- it was  
19 aggravating it. Dr. Eisenberg said riding the bikes and  
20 stuff--

21 Q You can't tell us what the doctor said.

22 A I'm sorry.

23 Q That's okay. After you finished the therapy, what  
24 was the next phase of your treatment, Lester?

25 A He went back to rest for a few months and changed my

1           medications. He kept changing my medications trying to find a  
2           medicine that would work.

3           Q       And then by the fall of 1998, I guess, about seven  
4           or eight months after the accident --

5           A       Right.

6           Q       -- tell us about the treatment then.

7           A       Then he went to, he says, let's do the epidural  
8           steroid injections.

9           Q       Now, can you explain to us what are epidural steroid  
10          injections and how those are done?

11          A       They take you to -- they don't do it at his office,  
12          they take you to the hospital as an outpatient, and they take  
13          you and hook you to an IV. And an anesthesiologist, the  
14          person that puts you to sleep, I guess, Dr. Durette was his  
15          name, he's the one that give you those shots. And they hook  
16          you to an IV, and put it in your arm and everything, lay you  
17          on a gurney, and then they take you back there to where he is.

18          And then they make you sit up and lean over the bed and put  
19          your feet in a chair, and then they -- they do you like this,  
20          and they lay you forward, push your head down, and they have  
21          two nurses, one on this side and one on this side, and then  
22          they hold you down, and they tell you you can yell but you  
23          can't move. If you move, you know, it will go in the wrong  
24          place and you will get paralyzed, or something for like, you  
25          know, weeks or something, not bad, but it hurts really bad.

1 Then they go -- he comes in and goes in right in the middle --  
2 in the lower back right close to the buttocks in the lower  
3 back, he goes in with a little needle first and puts a little  
4 numbing stuff, and then he goes in with a really big needle  
5 and shoots that steroid in there, it hurts pretty bad.

6 Q How many of those did you have?

7 A Three.

8 Q Did you get -- did any of them give you any relief?

9 A Yes, sir. The middle one that -- you couldn't have  
10 them but every two weeks apart, and the middle one helped for  
11 four or five days.

12 Q Was that -- did you get encouraged by that?

13 A Yes, sir. I thought, he is on to some -- I said,  
14 they are on to something, they know what is wrong with it, or  
15 something. And it went right back to the same.

16 Q What came next?

17 A More rest, kept changing the pain medications. And  
18 he said, I am going to refer you to a surgeon, Dr. Epstein.

19 Q And you went and got an evaluation to see if surgery  
20 would help?

21 A That's right, yes, sir.

22 Q Anybody recommend any surgery that would help?

23 A No, sir.

24 Q For the last year or so, you have been in the last  
25 kind of phase of your treatment?

1 A That's right.

2 Q That's with what doctor?

3 A Dr. Downey, a chronic pain management.

4 Q And tell us what Dr. Downey is doing for you.

5 A He increased my pain medicine, put me on some really  
6 strong stuff, and he gives me trigger point injections once a  
7 month. Like February 20th, he gave me three shots in the  
8 back, and like March 13th, he gave me two shots in the back.  
9 And I think I go back April 24th, or something. But he gives  
10 me injections.

11 Q Do those help?

12 A Yes, sir. Yes, sir. I do pretty good on those for  
13 four or five days, and then it starts hurting bad again.

14 Q What type of medications is he giving you?

15 A I take Celebrex, 200 milligrams, for inflammation.  
16 I take Neurontin 300 milligrams three times a day for nerve  
17 pain in the leg. I take Oxycontin, that's the strong pain  
18 pill, I take that two to three times a day for the pain.

19 Q Does that help?

20 A Yes, sir, that helps. And then I take Zoloft,  
21 that's for depression, 50 milligrams once a day.

22 Q Let me show you what's -- Exhibit 67. Did you go by  
23 your pharmacy and get a printout of all your medications you  
24 have been taking?

25 A Yes, sir. That's a printout of all my medicine for

1 the last three years.

2 MR. WETTERMARK: And this -- we'll offer Exhibit  
3 67.

4 MR. GARLAND: No objection.

5 THE COURT: It's admitted.

6 A The Witness: That's all at Aiken Drug.

7 MR. WETTERMARK: May I submit this to the jury?

8 THE COURT: Yes, sir. You may.

9 Q Mr. Wettermark: Lester, you said that you were  
10 on anti-depression medication; when did your depression start  
11 that you -- I should say, when did you become aware of the  
12 depression?

13 A Well, I was a little disgusted the first summer --  
14 you know, I got hurt in January, and when summer hit, April,  
15 May, June, all my friends are, you know, playing golf, and  
16 doing this and that, and tennis and I was a little disgusted.  
17 And then I got through the winter okay, because nobody really  
18 does much. And then the next year, '99, when summer time hit  
19 and everybody is having their fun, and you know, my  
20 brother-in-law is playing tennis and bowling, and --

21 Q Can you do any of that stuff?

22 A Can't do any of that. They are out riding boats and  
23 jet skis and --

24 Q What did you like to do before this accident? Tell  
25 us some of the things you used to do for recreational

1 activities before.

2 A I have got a boat. I water skied. I tubed. I  
3 played golf. I bowled. I played tennis, basketball. I mean,  
4 I loved the outdoor stuff.

5 Q Well, actually -- I mean, you were a pretty good  
6 bowler, weren't you?

7 A Yes, sir. I --

8 Q What is your -- you told me that you had some --  
9 what was your best series?

10 A A 712. I had like a 298 game, you know -- this was  
11 in leagues and stuff. And I tried to find the patch, but I  
12 couldn't. But I had like a 298 game and a 712.

13 Q Is that pretty good?

14 A Yes, it's pretty good. I averaged like a 185, was  
15 my average.

16 Q Were you a pretty good golfer?

17 A Decent, mid-70s

18 Q Where I come from, that's pretty good.

19 A I love sports and I loved outdoors, you know.  
20 Anything with sports and outdoor, I loved it.

21 Q Have you played golf at all since this accident?

22 A I tried a couple of times. I went out there, you  
23 know, and they were playing. And I said, let me see what I  
24 can do, and I couldn't do it, you know. And then I hit some  
25 balls, and I couldn't do that. And I went out there, and I

1       said, you know, let me see if I can play. And I played two  
2       holes and almost threw up. And I said, I can't play, I can't  
3       do it. That was like in the middle of '98, and I haven't  
4       tried since.

5           Q     Let me talk to you a little bit about finding work.

6           A     Okay.

7           Q     After this accident first happened, when you were  
8       first treating with Dr. Eisenberg, did you think and feel that  
9       you were going to be able to get back to work?

10          A     Oh, yes, sir. I wanted -- I knew I would get back  
11       to work, I said, you know, I wanted to be -- I loved it.

12          Q     What do you mean you loved it, you like your job?

13          A     Oh, yes, sir. I love it. It's fun switching cars  
14       and riding trains, and I love the outdoor stuff, you know.

15          Q     Well, shortly after you got injured, were you in  
16       contact with the Rehabilitation Department of the railroad?

17          A     Yes, sir, I was.

18          Q     And did you write them letters telling them your  
19       interest?

20          A     Yes, sir. We kept writing back and forth.

21          Q     Let me show you what I will identify as Exhibit 48.  
22       Is this a letter that you wrote to the railroad's  
23       Rehabilitation Department --

24          A     Yes, sir. It is.

25          Q     -- in May 11th of 1998?

1 A Yes, sir, that's right.

2 MR. WETTERMARK: We will offer Exhibit 48.

3 MR. GARLAND: No objection.

4 THE COURT: It's admitted.

5 Q Mr. Wettermark: Would you just read that for the  
6 Jury, real quick?

7 A Can I put these reading glasses on?

8 Q Yes, sir.

9 A It says, "Dear Ms. Wilson, thank you for letter for  
10 May 4th, 1998. I appreciate your offer for rehabilitation.  
11 services. At the present time, however, I am still under the  
12 care of my doctors, and I am very hopeful that I will recover  
13 from my injuries to the extent that I can return to my former  
14 employment with the railroad. I have invested much of my life  
15 in railroad work and I do not want to give up my job or my  
16 seniority without having done everything I can from a medical  
17 standpoint to recover from my injuries. If at some future  
18 date it appears that I won't be able to return to my former  
19 employment, then I would like to avail myself to whatever help  
20 you, or anyone else, can find and give me productive  
21 employment. Thank you again for your consideration, Lester E.  
22 Kirkland, Jr.."

23 Q Then, let me show you. This is May of 1998 -- let  
24 me show you what I will identify as Exhibit Number 50, dated  
25 August 24th, 1998; is that, again, another letter you wrote to

1 the Norfolk Southern people?

2 A Yes, sir.

3 MR. WETTERMARK: We will offer Exhibit 50.

4 MR. GARLAND: No objection.

5 THE COURT: It's admitted.

6 Q Mr. Wettermark: And in this --

7 A That's to Mr. Maher.

8 Q I won't ask you to read the whole letter. But if  
9 you will, just read that sentence.

10 A Okay. If the worst happens, and I am permanently  
11 disabled as a trainman, then I would very much like any  
12 assistance that Norfolk Southern could give me in trying to  
13 find alternative employment.

14 Q I'm not going to go through all these letters, but  
15 eventually, did your doctor tell you that you could not go  
16 back to railroad work?

17 A Yes, sir, he did.

18 Q And when was that?

19 A Shortly after I saw Dr. Epstein I met with Eisenberg  
20 again, and -- like in February or March of '99, and he said I  
21 could not -- he said I could not go back.

22 Q Let me show you Exhibit 52. Is this the first  
23 letter you wrote to the railroad after you were told you  
24 couldn't go back to railroad work?

25 A Yes, it is.

1 MR. WETTERMARK: We will offer Exhibit 52.

2 THE COURT: What's the date of that one, now?

3 MR. WETTERMARK: March 31st, 1999.

4 MR. GARLAND: No objection.

5 THE COURT: That's admitted.

6 O Mr. Wettermark: Will you just read, if you  
7 would, just read this portion of the letter, start right  
8 there, and go all the way through that paragraph, because I  
9 want to ask you about that.

10 A "I have just finished receiving an evaluation by Dr.  
11 Eisenberg. He has advised me that I will never be able to  
12 return to my former work as a trainman for the railroad.  
13 Obviously, this is very disturbing news to me, nevertheless, I  
14 am willing to accept this fact, and I am trying to move  
15 forward with my life. Obviously getting some sort of gainful  
16 employment is highest on my list. Any help you can give me in  
17 this regard would be greatly appreciated. As you may know, I  
18 have worked out of, and lived in the Aiken, South Carolina  
19 area for the past nine years. I have made a commitment to my  
20 daughter that I will not be an absentee father. My friends  
21 and roots are now here. The reason I tell you this is because  
22 I very much want to find a job in this area. I realize that  
23 when you are unemployed and disabled you can not be choosy,  
24 but at the same time, however, moving out of this area would  
25 be a last resort. I would greatly appreciate it if you could

1 help me find a job in this area. I'm willing" -- oh, you want  
2 me to stop?

3 Q That's fine. Is that the only request you made out  
4 of them, that they try to find you a job close to your home?

5 A Yes, sir.

6 Q In your letter, you talk about your daughter; are  
7 you very close with your daughter?

8 A Yes, sir. It's really a stepdaughter.

9 Q You are divorced from your wife now?

10 A Yes, sir, we are divorced.

11 Q But you still retain that relationship?

12 A Oh, yes, sir, it was a friendly divorce.

13 Q Let me show you Exhibit 66. Are these photographs  
14 of you before the accident, with your daughter?

15 A Yes, sir. It is.

16 MR. WETTERMARK: We will offer Exhibit 66.

17 A The Witness: I think that's like the beach, and  
18 the Grand Canyon.

19 MR. GARLAND: No objection.

20 THE COURT: It's admitted.

21 Q Mr. Wettermark: And let me show you Exhibit 65.  
22 Are these the photographs I have asked you to find, just that  
23 show you, some of the activities that you enjoyed doing before  
24 this accident?

25 A Right. That's me skiing up top, my wife and I

1 playing her mom and dad in tennis, and that's my daughter,  
2 Jenna, and I, riding a waterfall.

3 MR. WETTERMARK: We will offer 65.

4 MR. GARLAND: No objection.

5 THE COURT: They are admitted.

6 MR. WETTERMARK: May I submit these to the jury?

7 THE COURT: Yes, sir. You may.

8 Q Mr. Wettermark: Mr. Kirkland, the first job  
9 offer the railroad gave to you for a railroad job, where was  
10 it?

11 A Like Dearborn, Michigan.

12 Q Have you written to them additional times asking  
13 them to try to find you work near your home?

14 A Yes, sir, I have.

15 Q Let me show you Exhibit 54. Is this a letter I  
16 wrote on your behalf to the railroad?

17 A Yes, sir. It is.

18 Q It's dated September 8th, 1999. Exhibit 54.

19 THE COURT: I'm sorry, what was the date again?

20 MR. WETTERMARK: September 8th 1999. We will  
21 offer 54.

22 MR. GARLAND: No objection.

23 THE COURT: It's admitted.

24 Q Mr. Wettermark: Read that to us.

25 A "Dear Mr. Maher, thank you for your letter of August

1       31st, 1999. I have discussed with Mr. Kirkland the offer of  
2       the dispatcher jobs in Dearborn, Michigan and/or Atlanta,  
3       Georgia. As Mr. Kirkland has indicated to you in the past,  
4       his personal situation is such that he needs to seek  
5       employment in his locality. Does Norfolk Southern have any  
6       sedentary or light-duty type jobs in Mr. Kirkland's part of  
7       South Carolina? If so, he would certainly be interested in  
8       them. In the meantime, I am trying to get a functional  
9       capacities evaluation for Mr. Kirkland so we can see what he  
10      is able to do. I will forward the results to you. Sincerely,  
11      James Wettermark."

12           Q     And you actually went and got a functional  
13      capacities evaluation, didn't you?

14           A     Yes, sir, I did.

15           Q     To see what you could do?

16           A     To see what I could do.

17           Q     Did there come a time when the railroad found you a  
18      job in your locality?

19           A     Yes, sir, they did.

20           Q     What type of job was it?

21           A     As a dispatcher.

22           Q     Did you go apply for that job?

23           A     Yes, sir, I did.

24           Q     Where did you go to apply for it?

25           A     To the Superintendent's office in Greenville, South

1 Carolina.

2 Q Let me show you Exhibit Number 61, dated March 20th,  
3 2000, to you from Mr. Maher's disability support services.

4 A Right.

5 Q This is Exhibit 61.

6 MR. WETTERMARK: We will offer 61.

7 MR. GARLAND: No objection.

8 THE COURT: Admitted.

9 Q Mr. Wettermark: Will you read the first  
10 paragraph, what happened to that job?

11 A "Dear Mr. Kirkland. I understand you met with Mr.  
12 Alley to discuss aspects of a dispatcher position. It is my  
13 further understanding you do not medically qualify for a  
14 dispatcher position at the present time."

15 Q Is that the only job that you have been offered in  
16 South Carolina?

17 A Yes, sir. It is.

18 Q They have offered you jobs in Atlanta as a clerk?

19 A Yes, sir.

20 Q How many times have you asked them or told them that  
21 you don't feel in a position to move there because of personal  
22 reasons?

23 A Lots of time. I said, let me be a clerk in  
24 Columbia, or something like that.

25 Q Let me show you Exhibit Number 62, dated March 24,

1 2000, to Mr. Maher from you.

2 A Right.

3 Q Is this a letter you wrote?

4 A Yes, sir.

5 MR. WETTERMARK: We'll offer Exhibit 62.

6 MR. GARLAND: No objection.

7 THE COURT: Admitted.

8 Q Mr. Wettermark: Read that second paragraph to  
9 us?

10 A "Dear Mr. Maher. As I have indicated to you in my  
11 prior conversations and correspondence, I have very strong  
12 personal reasons which prevent me from moving from South  
13 Carolina to Atlanta, Georgia. Obviously, the clerk jobs in  
14 Atlanta are not much good to me. As I have indicated, I would  
15 be interested in trying to find some work outside the  
16 railroad. Please have your vocational counselors contact me  
17 at their earliest convenience. Thank you, Lester Kirkland."

18 Q Well, did you -- did you work with some vocational  
19 counselors?

20 A Yes, sir, I do.

21 Q Who are you working with?

22 A Ms. Geneva Bookman.

23 Q Has she been able to find you a job?

24 A No, sir, not yet.

25 Q Has she found you -- has she gotten you a list of

1       jobs and places to go apply?

2           A     Yes, sir, she's --

3           Q     Tell us how many places that you can think of that  
4       you have gone to apply for work.

5           A     About 14 places, so far.

6           Q     Have any of them hired you?

7           A     No, sir.

8           Q     At some point in time did you go out and find work  
9       on your own?

10          A     Yes, sir. I started, you know, putting out word to  
11       my friends and all that I needed a job, that they couldn't  
12       find me anything to do. And I talked to people that run  
13       stores in the area and stuff like that, and I finally found a  
14       job.

15          Q     What type of job did you find?

16          A     It's with a mortgage company that does refinancing,  
17       and I do like, looking up stuff at Courthouses for them, to  
18       help them get people's homes refinanced.

19          Q     How much do they pay you?

20          A     \$7 an hour.

21          Q     Tell me how much you are working.

22          A     I have got it up now to -- I can get about 25 hours  
23       a week.

24          Q     Why can't you do more?

25          A     My back hurts. I get up and go and I will go to the

1 courthouse -- I live in an area where there is three counties  
2 real close to me and I will go and work at one courthouse for  
3 a couple or three hours, and my back will start hurting really  
4 bad, and so I have to go home and take the Oxycontin and lay  
5 down a little bit. And if it eases off, then I get up, I go  
6 back to a different courthouse and get leads for them at that  
7 courthouse.

8 Q Does your boss man allow you to do this?

9 A Yes, sir. He's -- it's like an honor system. He  
10 lets me work at my own pace, and -- I mean, he wants me to  
11 work as many hours as I can, he needs me to get all I can do  
12 for him, but he allows me to try to build up to it.

13 Q What do you think? Do you think you can ever make  
14 it into a full-time job doing that?

15 A Yes, sir, I am trying, yes, sir, I think I can.

16 Q Are you getting any insurance with that job?

17 A No -- not unless -- I have got to get it up to 40  
18 hours to get insurance. I am trying, because I mean, my  
19 insurance will run out this year.

20 Q Well, do you even know, does the job have insurance,  
21 do you know?

22 A I am not sure. I don't know if they do the people  
23 like me or not, because the other people are like commission,  
24 so I don't really know if they --

25 Q Let me show you, Mr. Kirkland, Plaintiff's Exhibit

1 Number 44. Are these your W-2 forms that show your earnings  
2 while you were still working for the railroad from 1994  
3 through 1999?

4 A Yes, sir. That's correct, that's right.

5 MR. WETTERMARK: We will offer Exhibit 44.

6 MR. GARLAND: No objection.

7 THE COURT: They're admitted.

8 Q Mr. Wettermark: The one thing I wanted to ask  
9 you, this 1997, does that represent -- in 1997, did you work a  
10 full year or was there a time when you weren't working?

11 A Yes, sir, there was a 45-day period -- there was a  
12 month and a half in '97 that I was not working.

13 Q So the '97 earnings are based on 10 and a half  
14 months?

15 A That's right.

16 Q Looks like in 1993 you made \$53,000?

17 A Yes, sir. That's right.

18 Q Pretty good money on the railroad?

19 A Yes, sir, real good. It's a good career, good  
20 insurance.

21 Q Mr. Kirkland, let me show you Exhibit Number 47.

22 Are these your tax returns from calendar years 1997?

23 A Yes, sir.

24 Q Looks like it's '93 through '97?

25 A Right, joint with Kathy, that's right.

1 Q Your wife worked as well?

2 A Yes, sir, she did.

3 Q So this has both her earnings and your earnings?

4 A Yes, sir, that's right.

5 MR. WETTERMARK: We'll offer 47.

6 MR. GARLAND: No objection.

7 THE COURT: Admitted.

8 Q Mr. Wettermark: Mr. Kirkland --

9 A That's a bag of clay from W. R. Grace.

10 Q You got one of the witnesses to stop by there and  
11 pick it up?

12 A Yes, sir. Got two bags, really, he did.

13 MR. WETTERMARK: We'll offer this as Exhibit  
14 Number 68.

15 MR. GARLAND: No objection.

16 THE COURT: It's admitted.

17 Q Mr. Wettermark: Mr. Kirkland, when Mr.  
18 Williamson was testifying he told us about how you and he kept  
19 a calendar, writing down on the calendar all the times that  
20 you all had contacted officials trying to get something done  
21 about the clay?

22 A Yes, sir, that's correct.

23 Q He told us he knows what happened to that calendar,  
24 but he wasn't there. Were you there?

25 A Yes, sir, I was there.

1 Q What happened to the calendar?

2 A Trainmaster -- Mr. Mass came in one day later, I  
3 think Lee left the job on his six months in June, and it was  
4 -- got to be like August or September and in walks Mr. Mass,  
5 the Trainmaster, and he walks around talking to the crew and  
6 stuff. He looks up on the wall and he sees this calendar  
7 where we have been writing -- I took over when Lee quit, and  
8 we was writing the officer's names in the little boxes of the  
9 dates. And he turned beet red, he walked over to the calendar  
10 and he flipped three or four pages. And he looked at me, he  
11 was red, and he grabbed that calendar off the wall and went  
12 out to the car, and got in the car and took off, took the  
13 calendar.

14 Q You have told us that the railroad operates on a  
15 seniority system; is that right?

16 A Yes, sir. That's correct.

17 Q The more seniority you have, the more job choices  
18 you have?

19 A That's right.

20 Q If you were still able to work on the railroad  
21 today, what job would you be working?

22 A Right now I would be working the job closest --

23 MR. GARLAND: Your Honor, I am going to object to  
24 this. I think this is getting a little far afield asking  
25 him to speculate and that sort of thing. I just don't

1 think that's appropriate.

2 THE COURT: What do you say, Mr. Wettermark?

3 MR. WETTERMARK: Let me try to rephrase it just  
4 to make sure.

5 Q Mr. Wettermark: Are you familiar with the jobs  
6 that are available to you with your seniority now?

7 A Yes, sir, that's correct.

8 Q And which job, that's available to you, with your  
9 seniority, is the closest to your home?

10 A The Greenwood/Newberry switcher, the job that I was  
11 working when I lived in Greenwood before I met Kathy. And now  
12 we're divorced, and it's the closest job to my house, it's  
13 like 20 miles to that job.

14 Q If you were able to work and you had a choice of  
15 jobs, which job would you choose?

16 A I would choose --

17 MR. GARLAND: Your Honor, I object to that. I just  
18 don't think it's appropriate to let him choose and pick  
19 and that sort of thing. I just don't think that's  
20 proper.

21 THE COURT: What do you say?

22 MR. WETTERMARK: I mean, I certainly think he is  
23 entitled to say which job he would be working if he was  
24 able to.

25 THE COURT: I will overrule the objection.

1       Q    Mr. Wettermark:     Which job would you work?

2       A    If my seniority would let me, I would work the  
3       Newberry switcher.

4       Q    Do you know who is working that job now?

5       A    Yes, sir, I do.

6       Q    Who?

7       A    Gary Walls.

8       Q    And does he have more or less seniority than you?

9       A    He has less.

10      Q    If we wanted to find out how much that job pays, is  
11      Mr. Walls the person who would know?

12      MR. GARLAND:   Your Honor, I am going to object to  
13      that. I think that's highly inappropriate.

14      MR. WETTERMARK:   I will withdraw the question.  
15      That's all I have, Mr. Kirkland. I think --

16      THE COURT:    Is that all the direct examination?

17      MR. WETTERMARK:   Yes, sir.

18      THE COURT:    Given the time, rather than running  
19      the risk of making it a longer day than it already has  
20      been, and Mr. Garland feeling rushed, I think it makes  
21      more sense for us to take our break for the evening. And  
22      we will resume in the morning at 9:00 o'clock with Mr.  
23      Kirkland here on the stand, at which time Mr. Garland  
24      will have his opportunity to cross examine Mr. Kirkland.  
25      As we break for the day, though -- you know what I'm

1 going to tell you, right? Don't talk about the case  
2 among yourselves as you leave or with anybody at home,  
3 your spouse, or any family member. They are going to  
4 want to know what you have been doing today, maybe, you  
5 can tell them you have been down here on Jury duty, but  
6 don't talk about the case. We don't want you getting  
7 into discussions with somebody else that's not hearing  
8 the evidence and not a part of this process, so don't  
9 talk about it with anyone as you leave, nor allow anybody  
10 that you might see as you leave to talk about it around  
11 you this evening, or in the morning as you return. But  
12 if you can be here at 9:00 o'clock in the morning, we  
13 will resume with the trial, and we will try to keep  
14 things moving along. And if everyone else will just stay  
15 where you are as these Jurors are excused for the evening  
16 to be back here in the morning ready to go at 9:00  
17 o'clock.

18 HEARING CONCLUDED: 5:10 p.m.  
19  
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24  
25

1 CERTIFICATE OF REPORTER

2 GEORGIA, JONES COUNTY:

3 I, Julia J. Scarborough, CCR, B-908, CERTIFY that  
4 acting in such capacity on March 19, 2001, I reported the  
5 trial in the above captioned case held before Hon. William  
6 Adams, and on the foregoing pages, numbered 5 through 150,  
7 both inclusive, have transcribed a true and accurate  
8 transcript of the same.

9 I FURTHER CERTIFY that I am not counsel for nor  
10 related to any of the parties; nor am I interested in the  
11 event or the outcome thereof.

12 WITNESS my hand and official seal this 30<sup>th</sup> day of  
13 April 2001.

14  
15   
16 Certificate No. B-908

25